Office Supreme Court, U. S.
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CLERK.

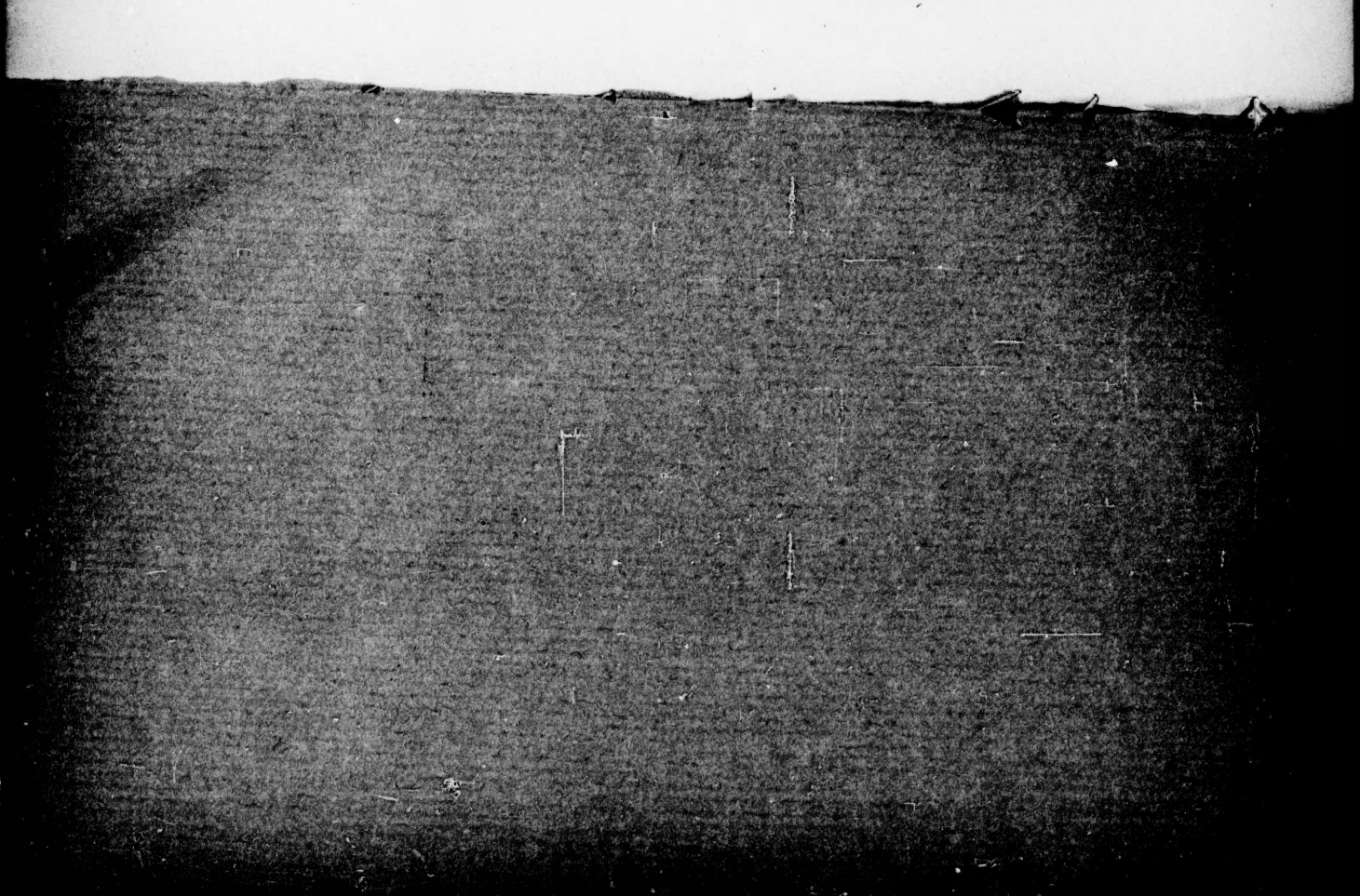
In the Supreme Court of the United States.

OCTOBER TERM, 1894.

M. F. BALL, JOHN C. BALL, AND R. E. Boutwell, plaintiffs in error,
v.
THE UNITED STATES.

No. ~~812~~. 461

MOTION TO ADVANCE.



In the Supreme Court of the United States.

OCTOBER TERM, 1894.

M. F. BALL, JOHN C. BALL, AND R. E. Boutwell, plaintiffs in error,
v.
THE UNITED STATES.
No. 812.

MOTION TO ADVANCE.

The plaintiffs in error were indicted and tried in the circuit court of the United States for the eastern district of Texas, in June, 1889, for the murder of one Wm. T. Box, in Pickens County, Choctaw Nation, in the Indian Territory. M. F. Ball was acquitted, and John C. Ball and Boutwell convicted. On writ of error to this court the judgments were "reversed and the cause remanded, with a direction to quash the indictment, and for such further proceedings in relation to the defendants as to justice may appertain." (See 140 U. S., 118.)

The plaintiffs in error were reindicted for the same offense, and on May 5th, 1894, were convicted, and sentenced on July 14th to be hanged.

The Solicitor-General respectfully moves the court to advance the case upon the docket and set it down for hearing at such day during the present term as may be convenient to the court.

Plaintiffs in error have been notified of this motion, and proof of service has been filed with the clerk.

LAWRENCE MAXWELL, Jr.,
Solicitor-General.

IN SUPREME COURT,

FOR THE UNITED STATES OF AMERICA.

OCTOBER TERM, 1893.

No. 4401

M. F. BALL, J. C. BALL, AND R. E. BOUTWELL,

Plaintiffs in Error,

versus

THE UNITED STATES,

Defendant in Error.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF TEXAS.

BRIEF FOR PLAINTIFFS IN ERROR.

By J. C. HODGES,
C. H. SMITH,
R. J. NICHOLS,
Att'ys for Plaintiffs in Error.

The Solicitor-General respectfully moves the court to advance the case upon the docket and set it down for hearing at such day during the present term as may be convenient to the court.

Plaintiffs in error have been notified of this motion, and proof of service has been filed with the clerk.

LAWRENCE MAXWELL, JR.,
Solicitor-General.

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IN SUPREME COURT,

FOR THE UNITED STATES OF AMERICA.

OCTOBER TERM, 1895.

No. ~~812.~~ 461 - 461

M. F. BALL, J. C. BALL, AND R. E. BOUTWELL,
Plaintiffs in Error.

versus

THE UNITED STATES,
Defendant in Error.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF TEXAS.

BRIEF FOR PLAINTIFFS IN ERROR.

By J. C. HODGES,
C. H. SMITH,
A. J. NICHOLS,
Att'ys for Plaintiffs in Error.

BENNETT, Printer, Bonham Street, Paris

IN SUPREME COURT,

FOR THE UNITED STATES OF AMERICA.

OCTOBER TERM, 1895.

M. F. BALL, J. C. BALL, AND R. E. BOUTWELL,

Plaintiffs in Error,

versus

THE UNITED STATES,

Defendant in Error.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF TEXAS.

Statement of Case:

M. F. Ball, J. C. Ball and R. E. Boutwell, were, at spring term of the Circuit Court of the United States for the Eastern District of Texas, sitting at Paris, Texas, on May 7th, 1891, indicted by the grand jury of said court for the crime of murder of one William T. Box, on the 26th day of June, 1889, in the Indian Territory.

On the 23d day of April, 1894, M. F. Ball filed a

special plea in answer to said charge in said indictment, which said plea is as follows:

In the United States Circuit Court, Eastern District of Texas.

UNITED STATES
vs. No. 230.
M. F. BALL ET AL.

And now comes M. F. Ball, one of the defendants in the above cause, and for special plea herein says:

First. That heretofore, on or about the 3d day of November, A. D. 1889, he was tried and acquitted at Paris, Texas, in a court of competent jurisdiction, to wit: In the Circuit Court of the United States for the Eastern District of Texas, upon an indictment, numbered 3 in said court, duly and legally presented therein, charging
7 this defendant jointly with J. C. Ball and R. E. Boutwell, with the same identical offense that is charged in indictment No. 230 herein, and upon which he is now called to answer. That indictment No. 3 aforesaid charged this defendant and his co-defendants with the same identical overt acts, i. e., shooting William T. Box, that they are now charged with in indictment No. 230 herein.

Second. That he was duly arraigned and pleaded not guilty to the charge in the said indictment No. 3; that thereupon he was tried before a jury of twelve men, duly and legally elected, empaneled, and sworn to try the issue so joined, in the United States Circuit Court for the Eastern District of Texas, holding session at Paris, Texas, and being the court wherein said indictment was duly and legally presented by a grand jury duly organized by said court.

Third. That on the 3d day of November, A. D. 1889, the jury so selected, empaneled, and sworn, after hearing the evidence and the charge of the court, returned into court the following verdict to-wit: "We the jury find the defendants J. C. Ball and R. E. Boutwell guilty, as charged in this indictment, and we find M. Filmore Ball not guilty. A. P. Ball, foreman, Nov. 3d, 1889." The court received and filed said verdict, and then and there rendered its judgment as follows: "It is
8 therefore ordered by the court that the defendants, J. C. Ball and R. E. Boutwell, are guilty as

charged in the indictment herein and as found by the jury, and it is ordered that they be remanded to the custody of the marshal, and by him committed to the county jail of Lamar county to await the judgment and sentence of the court. It is further ordered that the defendant M. F. Ball be discharged and go hence without day." All of which proceedings appear upon the record of said United States Circuit Court in and for the said Eastern District of Texas, holding sessions at Paris, Texas, a certified copies of said entries are hereto attached, marked "Exhibit A," and made a part hereof; which said judgment was never vacated, annulled, or set aside in any way.

Fourth. Defendant shows to the court that said indictment No. 3 aforesaid was a good and valid indictment, and charged this defendant with the commission of a felony, and in so charging charged this defendant with the same overt acts, to-wit: the shooting of William T. Box, that are charged in the indictment No. 230, to which affiant now pleads.

Wherefore affiant pleads former jeopardy and former acquittal upon the same identical offense charged in the indictment in this cause.

Fifth. Defendant says that if he is mistaken as to the bill of indictment No. 3 as aforesaid, charging him and his co-defendants with the same offense
9 charged in indictment No. 230, and the court should hold that indictment No. 3 only charged this defendant and his co-defendants with assault with intent to kill William T. Box, then this defendant for special plea in this behalf shows to the court that the shooting and wounding William T. Box, charged in said indictment No. 3, is the same identical shooting that is charged in indictment No. 230 and is one and the same transaction; and that the said William T. Box died before the filing of the indictment No. 3 against the defendant and his co-defendants, and which fact was known to the district attorney who drew the bill of indictment and to the grand jury that presented said indictment No. 3, and that by the terms of said indictment this defendant was charged with assault with intent to kill said William T. Box, and was tried in said court and acquitted of said offense of assault to kill and all other offenses charged in said indictment. This defendant therefore charges that the United States, by its legally constituted grand jury, district attorney, and Circuit Court as aforesaid, in the manner aforesaid,

and without the consent of this defendant, carved out of the shooting of William T. Box the offense of an assault to kill, and tried this defendant, of which said offense he was duly and legally acquitted. Wherefore he pleads said acquittal in bar of any further prosecution for the alleged shooting of William T. Box, as charged in said two indictments.

THE STATE OF TEXAS, }
County of Lamar. }

I, M. F. Ball, defendant mentioned above, on oath, say that I am the identical M. F. Ball mentioned in indictments No. 3 and No. 230, presented in the Circuit Court of the Eastern District of Texas, having sessions at Paris, Texas, and that the facts set forth in the above and foregoing plea are true.

M. F. BALL.

Sworn to and subscribed before me this 18th day of April, 1893.

A. D. BROOKS,
Clk. U. S. Dist. Ct., E. D. T.

On the 23d of April, 1894, J. C. Ball and R. E. Boutwell filed special pleas as follows:

THE UNITED STATES }
vs. } No. 230.
M. F. BALL ET AL. }

And now come the defendants, J. C. Ball and R. E. Boutwell, herein, and for special plea herein they say:

First. That on the 17th day of October, A. D. 1889, the grand jury for the United States of America, empaneled in the Circuit Court for the Eastern District of Texas, holding sessions at Paris, Texas, returned and presented in said court a bill of indictment, numbered 3, against these defendants and M. F. Ball, charging them jointly with the same overt acts that are charged in the indictment numbered 230, that defendants are now called to answer; a certified copy of said indictment No. 3 is hereto attached marked "Exhibit A" for identification and made a part hereof; that the facts and acts charged in said indictment No. 3 were and are the same identical acts and transaction charged in the indictment No. 230 herein.

Second. On the 30th day of October, A. D. 1889, these defendants and their co-defendant, M. F.
13 Ball, was arraigned and placed on trial in said Circuit Court of the Eastern District of Texas, upon all the charges and offenses charged in said indictment No. 3, as will appear from a certified copy from the record of said court hereto attached, marked "Exhibit B" for identification and made a part hereof.

Third. On the 3d day of November, A. D. 1889, the jury empaneled in said court in said cause returned into court a verdict in words and figures as follows, viz: "We, the jury, find the defendants J. C. Ball and R. E. Boutwell guilty as charged in the indictment, and we find M. Filmore Ball not guilty. Nov. 3d, 1889. A. P. Ball, foreman."

Fourth. Said verdict was received in said cause without any objection from either of the defendants and by the court ordered filed and the jury discharged. Upon the return of said verdict the court then and there entered its judgment in words and figures as follows, to-wit: "It is therefore considered by the court that the defendants J. C. Ball and R. E. Boutwell are guilty as charged in the indictment herein and as found by the jury, and it is ordered that they be remanded to the custody of the marshal and be by him committed to the county jail of Lamar county to await the judgment and sentence of the court. It is further ordered that the defendant M. F. Ball be discharged and go hence without day." All of which is apparent from the record in said cause, certified
14 copies of which are hereto attached, marked "Exhibit C," and made a part hereof.

Fifth. Defendants allege that they were, by virtue of said verdict and judgment or order remanding said defendants to jail to await the judgment and sentence of the court, held in Lamar county jail until the present indictment, No. 230, was presented and filed against these defendants and their co-defendant M. F. Ball, after which time said case number 3 was dismissed without the knowledge or consent of these defendants, and they were then required to give bond to answer the charge in said indictment No. 230.

Sixth. Defendants show to the court that said indictment No. 3, aforesaid, charged these defendants and their co-defendant with unlawfully, and with malice aforethought, shooting and wounding William T. Box; that

said indictment was a good and sufficient indictment, fully charging them and each of them with the offenses of assault with intent to kill; that the shooting and wounding William T. Box, charged in said indictment No. 3, is the same identical shooting and wounding of William T. Box as charged in indictment No. 230 that they are now called upon to answer, and is one and the same shooting, and one and the same time, place, and transaction. That if said William T. Box ever died from gun shot wounds as charged in said indictment No. 230, that he died
15 before the said indictment No. 3 aforesaid was presented, which fact was known to the district attorney who drew the bill of indictment and to the grand jury that presented same before the same was presented; that the facts proved upon the trial of these defendants upon indictment No. 3 showed that Box was dead at the time they were tried on said indictment charging them with an assault with intent to kill William T. Box, by reason of which presentation of said indictment No. 3 and the empaneling and swearing the jury and arraigning these defendants for trial aforesaid, defendants say they were put in jeopardy for the same offense which they are now called to answer; that since the death of the said Willliam T. Box the government, by its legally constituted grand jury and circuit court aforesaid, and without the consent of either of these defendants, carved out of the shooting and wounding of William T. Box the offense of an assault with intent to kill, and tried and convicted these defendants, from which said conviction for an assault with intent to kill these defendants have never appealed; that if the court trying these defendants failed to render judgment upon the verdict of the jury finding these defendants guilty of an asssult with intent to kill as charged in indictment No. 3, it is no fault of these defendants; that they nor either of them has ever objected to a legal judgment being rendered upon said verdict finding defendants guilty as charged in said indictment No. 3.

16 All the objections the defendants ever made to the judgment of the court trying them was to the judgment sentencing them to death, which said judgment was not supported by the indictmont and verdict of the jury; that there is no order or judgment of this court vacating and setting aside said verdict unless the same was vacated and rendered void by the action of this court in dismissing said case No. 3, aforesaid.

Wherefore these defendants plead specially said facts in bar of further prosecution for the alleged shooting and wounding William T. Box, and pray that they be discharged and go hence without day.

Before the undersigned authority personally appeared J. C. Ball and R. E. Boutwell, who each, on oath, for himself says that he is the identical person named in the above and foregoing plea, and who is charged by indictment 230 with the murder of William T. Box; that the facts and allegations stated in said plea are true.

R. E. BOUTWELL.
J. C. BALL.

Subscribed and sworn to before me by each person, this 18th day of April, 1893.

A. D. BROOKS,
Clerk U. S. Dist. Court, E. D. T.

To this plea was attached certified copy of indictment No. 3, and of the order and judgment of the court in case No. 3. (See pages 8, 123 and 24).

To which pleas the district attorney demurred and moved to strike out as follows:

THE UNITED STATES
vs.
M. F. BALL, JOHN BALL, and ROBERT BOUTWELL. | No. 230.

Now comes the United States of America, by
21 and through Robert E. Hannay, United States attorney in and for the Eastern District of Texas, and excepts to the special plea of the defendants filed herein, and moves the court to strike out and hold the same for naught for the following reasons, to-wit:

First. Because the said special plea does not set forth the bill of indictment number 3 referred to therein, and does not set forth the records or any part thereof of the proceedings before the said court based upon said bill of indictment, and does not set forth the motion in arrest of jungment and other records filed in the said cause, and does not set forth the judgment of the Supreme Court in which said indictment is held valid for assault only, and in which said cause was remanded for further proceedings in the said circuit court.

Second. Because the said special plea should be made to speak the truth concerning all the proceedings which have been had in the said circuit and the said Supreme courts in the above styled and numbered cause.

Third. Because the said defendants and none of them have been tried in the said circuit court upon a valid indictment for the murder of William T. Box. That the bill of indictment number 3, referred to in the said special plea of the defendants, and upon which the defendants were put to trial was insufficient in law, and was
22 void, and was in form and substance so defective that no valid judgment could have been entered of record in any cause or proceeding based upon said bill of indictment.

Fourth. Because none of the said defendants have been in legal jeopardy by virtue of any proceeding based upon said void, defective, and insufficient indictment, and the said defendants and none of them have been legally tried for the crime of murder, as set out in the indictment filed herein and numbered 230.

Fifth. Because whatever acquital or conviction there may have been in the said former proceeding was void and should go for naught; and further, because no penalty has been inflicted or attempted to have been inflicted upon the said defendants, or either of them, upon any judgment or order of the said circuit court based upon said void proceeding; and further, because no punishment or penalty could have been legally inflicted upon said defendants, or either of them, upon any such order or judgment.

ROBT. E. HANNAY,
U. S. Atty., E. D. T.

23 TUESDAY, May 1st, 1894.

Court met pursuant to adjournment. Presiding and present, Hon. D. E. Bryant, judge. Also present, R. E. Hannay, Esq., U. S. attorney; Frank Lee, Esq., assistant U. S. attorney; J. S. Williams, U. S. marshal, and C. Dart, clerk. By H. H. Kirkpatrick, deputy.

* * * * * * *

THE UNITED STATES)
vs.) No. 230.
M. F. BALL ET AL.)

This day this cause came on to be heard upon the plea

of former acquittal and former jeopardy interposed herein by the defendant M. F. Ball, and the argument of counsel thereon being heard and the court being fully advised, because it is the opinion of the court that the law is against the defendant, the plea is overruled and denied; to which ruling of the court defendant in open court excepted.

THE UNITED STATES
vs. No. 230.
M. F. BALL ET AL.

This day came on to be heard the special plea of former jeopardy interposed herein by defendants, J. C. Ball and R. E. Boutwell, and the argument of counsel thereon being heard and the court being fully advised, because it is the opinion of the court that the law is against the defendant, the plea is overruled and
24 denied; to which ruling of the court the defendants in open court excepted.

On the 30th day of April, 1894, M. F. Ball filed a plea to the jurisdiction of the court as follows:

THE UNITED STATES
vs.
M. F. BALL ET AL.

And now comes M. F. Ball, one of the defendants in the above-entitled and numbered cause, and says the government ought not further prosecute this cause against this defendant, because he says that the crime charged against this defendant is not an offense against the laws of the United States, and that this court has no jurisdiction to try him for said alleged offense, for the reason that the deceased, William T. Box, and this defendant were each citizens of the Chickasaw Nation and members of the tribe of Chickasaw Indians at the time this offense is alleged to have been committed, and the crime alleged in the indictment was committed, if at all, in the said Chickasaw Nation, Indian Territory.

Wherefore this defendant says that this court has no jurisdiction to try this defendant for the crime charged against him herein, and he prays that he be discharged and go hence without day.

HODGES & NICHOLS, and
J. M. LONG,
Attys. for Deft.

On May 1st plaintiffs in error filed motions praying for a severance, which motions were overruled. (See record, pages 12 and 13).

Plaintiffs in error were forced to trial, which resulted in the conviction of all three for murder.

Motions for new trial and in arrest of judgment were filed and overruled, plaintiffs sentenced to death; plaintiffs in error excepted and filed petition for error, and assigned many errors, some of which we will now consider.

We will consider the assignments of error in their logical order, as presented by the record:

III.

Assignment:

The court erred in sustaining the motion made by the district attorney to strike out the special plea of
673 former jeopardy and former acquittal of the defendant M. F. Ball filed herein on the 25th day of April, A. D. 1894, which said special plea and motion to strike out the same are made parts of the record herein, here referred to and made a part hereof, because said special plea showed that the said defendant M. F. Ball had, before the indictment in this case had been presented in this court, been legally tried by a jury duly and legally empaneled in a court of competent jurisdiction, to-wit: in the Circuit Court of the United States in and for the Eastern District of Texas, at Paris, Texas, for the same offense charged against him in this cause, to-wit: for the shooting, wounding, killing and murdering of Wm. T. Box, and by said jury found not guilty of said offense, and by said court discharged by its judgment entered of record.

Statement from the Record:

On the 25th day of June, 1889, William T. Box was waylaid and shot at night in Pickens county, Chickasaw

Nation, Indian Territory, by some unknown party, or parties. On the morning of June 26th, 1889, Box was found dead with several buckshot wounds in his body. On the 17th day of Oct., 1889, the United States grand jury returned a bill of indictment No. 3 into the Circuit Court of the United States, Eastern District of Texas, at Paris, Texas, charging plaintiffs in error with the murder of William T. Box.

On the 30th day of Oct., 1889, M. F. Ball, J. C. Ball and R. E. Boutwell were each arraigned upon said indictment in said court and each entered a plea of not guilty. A jury was empaneled and plaintiffs in error were tried upon said indictment. On the 3d day of Nov., 1889, the jury empaneled in said case No. 3 returned into court the following verdict: "We, the jury, find J. C Ball and R. E. Boutwell guilty as charged in this indictment, and we find M. Filmore Ball not guilty. Nov. 3d, 1889. A. P. Ball, Foreman."

Upon the return of said verdict the court entered the following judgment:

> It is therefore considered by the court that the defendants J. C. Ball and R. E. Boutwell are guilty as charged in the indictment herein and as found by the jury, and it is ordered that they be remanded to the custody of the marshal and be by him committed to the county jail of Lamar county to await the judgment and sentence of the court.
>
> It is further ordered that the defendant M. F. Ball be discharged and go hence without day.

On the 15th of Nov. the court entered the following:

On May 1st plaintiffs in error filed motions praying for a severance, which motions were overruled. (See record, pages 12 and 13).

Plaintiffs in error were forced to trial, which resulted in the conviction of all three for murder.

Motions for new trial and in arrest of judgment were filed and overruled, plaintiffs sentenced to death; plaintiffs in error excepted and filed petition for error, and assigned many errors, some of which we will now consider.

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673 former jeopardy and former acquittal of the defendant M. F. Ball filed herein on the 25th day of April, A. D. 1894, which said special plea and motion to strike out the same are made parts of the record herein, here referred to and made a part hereof, because said special plea showed that the said defendant M. F. Ball had, before the indictment in this case had been presented in this court, been legally tried by a jury duly and legally empaneled in a court of competent jurisdiction, to-wit: in the Circuit Court of the United States in and for the Eastern District of Texas, at Paris, Texas, for the same offense charged against him in this cause, to-wit: for the shooting, wounding, killing and murdering of Wm. T. Box, and by said jury found not guilty of said offense, and by said court discharged by its judgment entered of record.

Statement from the Record:

On the 25th day of June, 1889, William T. Box was waylaid and shot at night in Pickens county, Chickasaw

Nation, Indian Territory, by some unknown party, or parties. On the morning of June 26th, 1889, Box was found dead with several buckshot wounds in his body. On the 17th day of Oct., 1889, the United States grand jury returned a bill of indictment No. 3 into the Circuit Court of the United States, Eastern District of Texas, at Paris, Texas, charging plaintiffs in error with the murder of William T. Box.

On the 30th day of Oct., 1889, M. F. Ball, J. C. Ball and R. E. Boutwell were each arraigned upon said indictment in said court and each entered a plea of not guilty. A jury was empaneled and plaintiffs in error were tried upon said indictment. On the 3d day of Nov., 1889, the jury empaneled in said case No. 3 returned into court the following verdict: "We, the jury, find J. C Ball and R. E. Boutwell guilty as charged in this indictment, and we find M. Filmore Ball not guilty. Nov. 3d, 1889. A. P. Ball, Foreman."

Upon the return of said verdict the court entered the following judgment:

> It is therefore considered by the court that the defendants J. C. Ball and R. E. Boutwell are guilty as charged in the indictment herein and as found by the jury, and it is ordered that they be remanded to the custody of the marshal and be by him committed to the county jail of Lamar county to await the judgment and sentence of the court.
>
> It is further ordered that the defendant M. F. Ball be discharged and go hence without day.

On the 15th of Nov. the court entered the following:

THE UNITED STATES
vs.
J. C. BALL & R. E. BOUTWELL. } 3.

This day this cause coming on to be heard upon the motion of defendants for a new trial herein, because it is the opinion of the court that the law is against the motion the same is overruled.

Friday, November 15th, 1889.—In U. S. Circuit Court, Eastern District of Texas.

THE UNITED STATES
vs.
ROBT. E. BOUTWELL & JOHN C. BALL. } 3.

By reason of the law and the evidence and the verdict of the jury in this case, it is ordered and adjudged that the defendants Robt. E. Boutwell and John C. Ball be executed by being hung until each and either are dead, according to the forms, delays, and processes provided in the laws of the United States.

This done and signed in open court, Nov. 15, 1889.

ALECK BOARMAN, Judge.

On the 18th day of July, 1890, the following order was entered in said case:

This day came the United States, by the United States attorney, and the defendant in his own proper person and by attorney appeared, and the United States attorney moved the court to fix a day of execution of the defendant, John C. Ball, and it appearing to the court that on the 15th day of November, 1889, during a former term of this court, the sentence of death was pronounced upon the defendant John C. Ball, for the crime of murder, in compliance with the law and the verdict of the jury rendered at that term of the court, to-wit: on the third day of November, 1889, and that no petition for writ of error to the Supreme Court of the United States has been filed with the clerk of this court, and no other proper proceedings for a revision of the finding herein by the Supreme Court of the United States have been begun; it is therefore ordered, adjudged and decreed by the court that the defendant John C. Ball be now remanded to the custody of the marshal, to be by him kept securely confined in the

jail of Lamar county, Texas, until Friday, the 19th day of December, 1890, when he shall be taken therefrom by the marshal, and between the hours of 12 o'clock m. and 4 o'clock p. m. of said 19th day of December, 1890, be hanged by the neck until he, the said John C. Ball is dead, and the clerk of this court is ordered to issue a death warrant in accordance with this sentence, and deliver the same to the marshal, who shall execute the same according to law.

Done in open court, July 18th, 1890.

DAVID E. BRYANT, Judge.

As to Robt. E. Boutwell, identically the same order was entered, except as to name of defendant.

This assignment presents the sole question as to whether or not the arraignment and trial of M. F. Ball upon said indictment No. 3 and his acquittal is a defense to the charge preferred in indictment No. 230 in this case.

First Proposition under this Assignment:

Box was shot, wounded and died from the effects of the wounds before indictment No. 3 was presented, which facts were known to the district attorney and grand jury before the bill was presented.

The government, by its legally constituted authority, having arraigned and tried plaintiff in error, M. F. Ball, upon indictment No. 3, and after verdict of not guilty entering a judgment discharging him, is a complete answer to the charge contained in indictment No. 230.

1st. Our contention is that M. F. Ball was legally placed in jeopardy for the offense of shooting and wounding William T. Box, when he, Ball, was arraigned upon indictment No. 3.

2d. That the verdict acquitting him was a legal verdict and the judgment discharging him was and is a valid judgment, and a bar to any further prosecution for any act of M. F. Ball for shooting and wounding William T. Box.

3d. Plaintiffs in error were well charged in indictment No. 3 with the offense of an assault with the intent to kill Box, the indictment being a good one for an offense against the laws of the United States.

Included in the shooting and killing of Box, an offense of which the jury might have found the plaintiffs in error guilty upon a good indictment for murder, the acquittal of M. F. Ball was properly pleaded in bar, and the court erred in striking out the special plea.

Authorities:

1st Wharton's Criminal Law, 541, 554, 563, 565.

Stevens vs. Fassett, 27 Me., page 266.

Com vs. Land, 3 Metc., 328.

Com vs. Miller, 5 Dand., 320.

Jones vs. State, 13 Tex., 138.

State vs. Cooper, 1 Green, N. Y., 361.

State vs. Lewis, 2 Hawks, 98.

1st Herman on Estoppel, Sec. 416.

Craft vs. the People, 15 Hon., 484.

People vs. Neysomchong, 28 American State Report, 129.

People vs. Neysomchong, 9 American State Report, 59.

Wharton's Criminal Evidence, Sec. 143.

1st Bishop's Criminal Law, Sec. 1021.

IV.

The court erred in sustaining the motion made by the district attorney to strike out the special plea of former jeopardy and former conviction of the defendants J. C. Ball and R. E. Boutwell filed herein on the 25th day of April, A. D. 1894, which said special plea and motion are made parts of the records in this case, here referred to, and made a part hereof, because said special plea of said defendants showed that the matters charged in indictment No. 3, presented to the Circuit Court of the United States, Eastern District of Texas, and the matters charged in the indictment in this case, are for one and the same transaction and offense, to-wit: For the shooting, assaulting, killing, and murdering William T. Box; that at the time said indictment No. 3 was presented against said
674 defendants in said court the government's prosecuting officer and the grand jury that returned the same knew that William T. Box was dead; that the government, through its duly constituted grand jury and prosecuting officer, had and did by the finding and presenting of said indictment No. 3 in said circuit court, in and for the eastern district of Texas, (which said indictment No. 3 is a part of the record in this case, here referred to, and made a part hereof) against the said defendants J. C. Ball and R. E. Boutwell carved out of the shooting, assaulting, killing, and murdering of said Wm. T. Box, a lesser offense than that of murder—that is to say, the government, through its said grand jury and prosecuting officer, carved out of said shooting, assaulting, killing, and murdering of Wm. T. Box, by the presentation of said indictment No. 3 in said court, the offense of an assault to kill and murder the said Box, and upon said indictment No. 3 the said defendants J. C. Ball and R. E. Boutwell were placed upon trial in said circuit court before a jury duly selected, empaneled, and sworn, and a verdict of guilty of said offense returned against them by said jury, upon which a judgment of said court was pronounced and entered against them, adjudging them, the said J. C. Ball and R. E. Boutwell, guilty of said offense, and said defendants thereby placed once in jeopardy and the government thereby barred from prosecuting them for the crime of murder.

This assignment presents for determination the legal

effect of the conviction of plaintiffs in error, J. C. Ball and R. E. Boutwell, of the offense charged in indictment No. 3. The assignment sufficiently presents the propositions we make.

We submit: 1st. That indictment No. 3 charged plaintiffs in error with an asault with intent to kill William T. Box. It may be claimed that as the indictment was not a good one for murder that therefore it was not good for an assault with the intent to kill. Such a position is not tenable. The indictment No. 3, after charging, "did unlawfully, fraudulently and feloniously, and with their malice aforethought, and with a certain deadly weapon, to-wit: a certain gun in the hands of the said M. F. Ball, J. C. Ball and R. E. Boutwell, then and there held, made an assault in and upon the body of one William T. Box, with said gun held as aforesaid, said gun being then and there loaded and charged with gunpowder and leaden balls, then and there held and used as aforesaid, the said M. F. Ball, J. C. Ball and R. E. Boutwell did shoot off and discharge the contents of said gun in and upon the body of the said William T. Box, inflicting thereon ten mortal wounds, of which mortal wounds the said William T. Box did languish and languishing did die." Said grand jury further charged: "And so the grand jurors upon their oaths aforesaid, do say that upon the day aforesaid, at the place aforesaid, with said deadly weapon aforesaid, in the manner aforesaid, and used as aforesaid, did unlawfully and feloniously, and with their malice aforethought, and the malice aforethought of each

of them, did kill and murder the said William T. Box. The said M. F. Ball, J. C. Ball and R. E. Boutwell, and each of them being there, white men and not citizens of the Chickasaw Nation or of the Indian Territory, or any nation or tribe thereof, contrary to the form of the statutes of the United States of America in such cases made and provided, and againt the peace and dignity of the United States of America."

Certainly it will not be seriously contended that said indictment did not sufficientl charge the unlawful intent of plaintiffs in error to kill Box. To charge a wilful act is to charge an intentional act. To assalt and kill one with malice aforethought is an intentional killing. If so, then indictment No. 3 charged all that is necessary to constitute a statutory offense of an assault with intent to kill. If we are incorrect in this, then we say that every indictment for murder includes the offense of an assault with intent to kill, and a party charged with murder may be convicted of an assault with intent to kill. (Revised Statutes, Sec. 1035). It will readily appear to the judicial mind that if indictment No. 3 had charged the date and place William T. Box died, then the indictment would have been good for murder. Neither the date or the place he died was necessary to charge an assault with intent to kill. The place where the assault was committed is stated, and it would make no difference when or where he died. The offense of an assault with intent to kill was complete when the shooting and wounding was done, if he had

never died. The fact that the indictment charges that they with their malice aforethought shot, wounded and killed Box, was a complete charge of an assault with intent to kill, but not good for murder, because it did not charge that Box died within a year and a day from the date he received the wounds, and did not name the place he died.

In the case of Ball vs. United States, 140 U. S. Report, page 136, the court says the "plaintiffs in error were well charged with an assault, but not with murder." If they were well charged with an assault, certainly the charging part of said indictment above quoted is sufficient to constitute said assault with intent to kill.

Authorities:

1st Bishop's Criminal Procedure, Sec. 521, 524 and 525.

Second Proposition:

Assuming that indictment No. 3 was a good indictment for an assault with intent to kill; what then was the effect of the judgment rendered by the circuit court on the 3d of Nov., 1889, adjudging J. C. Ball and R. E. Boutwell guilty as charged in said indictment? (See record, page 123). Was the judgment a valid judgment? We think so.

The indictment charged plaintiffs in error with shooting, wounding and killing William T. Box, with malice aforethought. The jury found them guilty as charged in the indictment. The finding related to that which was

well charged in the indictment. Hence the judgment is a valid judgment, from which no appeal has ever been taken by plaintiffs in error. This judgment was rendered Nov. 3d, 1889, and plaintiffs in error did not file petition for writ of error until after the 18th day of July, 1890, more than eight months after the rendition of said judgment. The Supreme Court did not reverse said judgment when they passed upon the case upon a writ of error. Said court reversed the orders fixing the penalty of death against plaintiffs in error. The court used the following language: "And returning jurisdiction, we hold that the orders of Nov. 15th, 1889, and July 18th, 1890, must be reversed for errors indicated. It may be that this leaves it open to us to remand the case with an order to the circuit court to proceed and give judgment on the verdict." Hence we see the judgment is yet a valid judgment, and the only judgment that could have been rendered upon order of the Supreme Court would have been fixing the penalty for the offense of which plaintiffs in error were found guilty. (See 140 U. S. Report, page 133). Plaintiffs in error were held as prisoners by virtue of said judgment from the 3d day of Nov., 1889, until the presentation of indictment No. 230, on the 7th day of May, 1891, more than 18 months. Said judgment is yet a valid judgment, unless vacated by a dismssal of case No. 3.

Third Proposition:

Plaintiffs in error, J. C. Ball and R. E. Boutwell,

were legally tried and convicted for the offense of assaulting, shooting and wounding William T. Box, said assault and wounding being acts and an offense and a necessary ingredient of the offense of murdering Box. Said conviction is a bar to further prosecution for any act of assaulting, shooting and wounding Box at the time and place laid in indictment No. 3, admitted to be the same transaction. (See record, 126).

Fourth Proposition:

The indictments having charged one and the same acts and transaction, and the government having selected and convicted plaintiffs in error for the offense of assaulting, shooting and wounding Box, there can be no further prosecution on the murder.

Authorities:

1st Wharton's Criminal Law, Sec. 565, and authorities before cited.

VI.

The court erred in overruling the written motion of the defendants J. C. Ball and R. E. Boutwell, filed herein before this case was called for trial, asking that they be awarded a separate trial from their co-defendant M. F. Ball, and in forcing them to be tried jointly with their said co-defendant M. F. Ball, because said motion which is made a part of the record in this cause and here referred to, stated facts sufficient to entitle them to a separate trial in this cause.

The court ought to have granted the motion for a severance made by plaintiffs in error, J. C. Ball and R. E.

Boutwell, because of reasons stated in said motion, as follows:

In the Circuit Court of the United States, Eastern District of Texas.

THE UNITED STATES)
vs.
M. F. BALL ET AL.)

27 Now come the defendants J. C. Ball and R. E. Boutwell, and pray the court to grant them a severance in this case that they may have a separate trial from their co-defendant M. F. Ball, for the following reasons, viz:

1st. Because their said co-defendant has once been tried and acquitted of the identical offense with which he is now charged.

2d. Because the government relies on acts and declarations of M. F. Ball as evidence upon which a conviction will be asked, which acts and declarations were made after the death of William Box, the party alleged to have been murdered, which acts and declarations were not made to the knowledge of or in the presence or hearing of either of these defendants.

3d. Because the proof that will be offered by the prosecution will show that M. F. Ball was not present at the time Box was killed, and was doing no act that would constitute him a principal in the alleged murder of William Box.

4th. Because this court has no jurisdiction to try M. F. Ball, as fully appears from his plea herein.

5th. Because M. F. Ball is a material witness for these defendants, and they have a right to his testimony free from the embarrasments of a defendant on trial.

Wherefore they pray that a severance be granted and that M. F. Ball be first tried.

We believe the evidence shows M. F. Ball to be an accessary before the fact and not a principal; hence J. C. Ball and R. E. Boutwell should have had a separate trial. If M. F. Ball was an accessory, then he should have been indicted as such, and to indict and try him jointly with J.

C. Ball and R. E. Boutwell, admitted his declarations, which was well calculated to prejudice the jury against plaintiffs in error, J. C. Ball and R. E. Boutwell, the court abused its discretion in not granting the severance as prayed for. If M. F. Ball was an accessory he could not legally be tried and convicted until after the conviction of his principals.

Authorities:

1st Bishop's Criminal Law, Secs. 668, 689, 803.

II.

The court erred in refusing to first try the special plea of the defendant M. F. Ball to the jurisdiction of the court, before these defendants were required to announce ready upon the merits of the case (which said special plea is made a part of the record herein, here referred to, and made a part hereof), because by submitting said special plea to the jury, together with the other issues in the case, there was created before said jury a multiplicity of issues, was liable to mislead and confuse them, and, by hearing all of the facts, prejudice them against the said M. F. Ball, and thereby influence said jury in finding against his said special plea.

Said plea is in words and figures as follows:

And now comes M. F. Ball, one of the defendants in the above entitled and numbered cause, and says that the government ought not further prosecute this cause against this defendant, because he says that the crime charged against this defendant is not an offense against the laws of the United States, and that this court has no jurisdiction to try him for the said alleged offense, for the reason that the deceased, William T. Box, and this defendant were

each citizens of the Chickasaw Nation and members of the tribe of Chickasaw Indians at the time this offense is alleged to have been committed, and the crime alleged in the indictment was committed, if at all, in the Chickasaw Nation, Indian Territory; wherefore this defendant says that this court has no jurisdiction to try this defendant for the crime charged against him herein, and he prays that he be discharged and go hence without day.

HODGES & NICHOLS and
J. M. LONG,
Attys. for Deft.

STATE OF TEXAS,)
County of Lamar.)

Before me, the undersigned authority, on this day personally appeared M. F. Ball, who being by me duly sworn, on his oath says that the facts set forth in the foregoing plea are true.

M. F. BALL.

Sworn to and subscribed before me, this 30th day of April, A. D. 1894.

H. H. KIRKPATRICK,
U. S. Commissioner.

The plea to the jurisdiction was not excepted to; it was sufficient upon its face to raise the question of jurisdiction of the court to try plaintiff in error for the offense charged, and we contend that plaintiff in error had the legal right to have the plea to the jurisdiction tried before he could be forced to plead to the charge in the indictment.

Authorities:

American Criminal Law, Wharton, 4th Ed., Sec. 534.

2 Hale, 286.

VII.

The court erred in sustaining the objection of the district attorney and in preventing the defendants from proving by the government witness Joe Cross how much he and Ed. Burney, both of whom were material witnesses for the government in this case, had paid or promised to pay Mr. Ownby for his services in assisting the district attorney in his prosecution of this case, because the same was a legitimate inquiry upon the trial of this cause, in that it tended to show the interest and feeling of said witnesses against these defendants.

VIII.

The court erred in permitting the government upon the trial of this cause to prove, over the objection of these defendants, by the government witness Ed. Burney, that he, the said Ed. Burney, and Joe Cross had not employed private counsel to assist in the prosecution of this case on account of any ill feeling towards either of these defendants, but they had employed such counsel because Wm. T. Box, the deceased, was a warm personal friend of theirs, a next door neighbor, and because they had known him for 20 or 25 years, because the same was an attempt upon the part of the government and tended to prove that the deceased was a revered and honored citizen, when neither of the defendants had put his character in issue, and was therefore calculated to prejudice the jury against these defendants charged with his murder.

We will consider VII. and VIII. assignments together.

Plaintiffs in error should have been permitted to prove what amount the witnesses were paying the private

prosecutor, to show interest and feeling in the case. This being denied plaintiffs in error, the witness Ed. Burney ought not to have been allowed to explain why he and Cross had employed counsel to prosecute plaintiffs in error.

IX.

The court erred in permitting the government to prove by its witness Maggie Freeman, over the objection of these defendants, that she heard the defendant J. C. Ball's son say, while all of these defendants were under arrest, "that if it had not been for those old boots they never would have suspected them of killing deceased," because the proper predicate had not been laid authorizing the admission of said testimony.

Where a prisoner is under arrest for crime, before any statement made by him can be offered in evidence against him, a predicate must be laid. No sufficient predicate having been laid, the testimony of Maggie Freeman was improperly admitted over the objections of plaintiffs in error. The evidence was damaging to plaintiffs in error.

Authorities:

U. S. Revised Statutes, Sec. 858.

Texas Statutes as follows: 2464.—Art. 750. When confession shall not be used.—The confession shall not be used if at the time it was made the defendant was in jail, or other place of confinement, nor while he is in custody of an officer, unless such confession be made in the voluntary statement of the accused, taken before an examining

court in accordance with law, or be made voluntarily after having been first cautioned that it may be used against him, or unless in connection with such confession he make statement of facts or of circumstances that are found to be true, which conduce to establish his guilt, such as the finding of secreted or stolen property, or instrument with which he states the offense was committed. (O. C. 662).

Ake vs. State, 30 Texas Report, 466.

Barnes vs. State, 36 Tex. Report, 356.

Adams vs. State, 34 Tex. Report, 526.

Our contention is that where there is no role laid down by the United States Statute, then the laws of the state in which the court is setting will govern as to the competency of the witness and the admisability of evidence.

X.

The court erred in admitting in evidence, over the objection of these defendants, a certified copy of a marriage license under the hand and seal of the clerk of Cooke county, Texas, showing that S. C. Mayfield married Lucy O. Box prior to the time she married the defendant herein M. F. Ball (which certified copy was made a part of the record herein and here referred to), because the government thereby proved the contents of a written instrument by substitutionary evidence without showing the loss or destruction of the original, and because said marriage license, or a certified copy thereof, was not endorsed upon the back of the indictment against these defendants, and because they had no notice whatever that the government would offer said marriage license or a certified copy thereof in evidence against them, and because said marriage license raised an issue in this case, to-wit: the validity of the marriage of M. F. Ball with Lucy O. Box, alias Lucy

O. Mayfield, which these defendants, and especially the said M. F. Ball, was not prepared to meet, and did not know would be raised upon the trial of this cause.

This assignment presents the question as to the right of the prosecution to use evidence upon the trial of a capital case without first giving notice to the defendant.

Our contention is that the law requires the names of all witnesses placed on the indictment and the defendant served with a copy of the names of witnesses. (Sec. 1033 Revised Statutes of the United States). The Statutes are silent as to documentory evidence. We think defendants should have had notice that the government would offer the certified copy of license in evidence. The Statutes of Texas are as follows:

Art. 2257, Revised Statutes of Texas.—"Every instrument of writing which is permitted or required by law to be recorded in the office of the clerk of the county court and which has been or may be so recorded after being proven or acknowledged in the manner provided by the laws in force at the time of its registration shall be admitted as evidence without the necessity of proving its execution; provided, that the party who wishes to give it in evidence shall file the same among the papers of the suit in which he proposes to use it, at least three days before the commencement of the trial of such suit, and give notice of such filing to the opposite party or his attorney of record, and unless such opposite party or some other person for him shall, within three days before the trial of the cause, file an affidavit stating that he believes such in-

strument of writing to be forged, and whenever any party to a suit shall file among the papers of the cause an affidavit stating that any instrument of writing recorded as aforesaid has been lost, or that he cannot procure the original, a certified copy of the record of any such instrument shall be admitted, in like manner aa the original could be."

Marriage license are required to be recorded. Art. 2842, Texas Statutes, provides:

"The said clerk shall record all licenses so issued by him in a well-bound book kept for that purpose, and it shall also be the duty of the persons solemnizing the rites of matrimony to endorse the same on the license and make return of the same to the office of the clerk of the county court within sixty days after the celebration as aforesaid, which return shall be recorded as aforesaid."

Sec. 906, U. S. Statutes, gives to records such faith and credit as is given them in the courts of the state or territory from which they are taken.

Our contention is the marriage license being required to be recorded that could only be admitted under the laws of Texas above quoted.

XI.

The court erred in admitting Mrs. L. O. Angling to testify, over the objections of these defendants, that "she thought she was legally married to one of these defendants, to-wit: M. F. Ball, but had learned since that she was not legally married to him, and that at the time she married the defendant M. F. Ball, her former husband, S. C. Mayfield, was living; that she had never been divorced

from him, and that the defendant M. F. Ball knew that said Mayfield was living at the time she so married the said M. F. Ball," because the said defendant M. F. Ball, prior to the time said witness so testified, introduced in evidence in this case a marriage license, issued by the legal authorities of the Chickasaw Nation, Indian Territory, showing that he, the said M. F. Ball, had, prior to the time Wm. T. Box was killed, married the said witness, and said witness testified that she lived with said M. F. Ball from the time she so married him up to the time her father, Wm. T. Box, was killed, and that she never had been divorced from him.

Mrs. Angling was not a competent witness against M. F. Ball, because she was, at the time she was offered, the wife of M. F. Ball, as fully appeared by the marriage license that had been offered in evidence. Mrs. Angling was not a competent witness to prove that she could not legally contract marriage at the time she married M. F. Ball. (1st Greenleaf on Evidence, Sec. 334).

XIII.

The court erred in refusing to require the government's officials to deliver the gun introduced in evidence to these defendants, or some other competent person, for the purpose of testing said gun as to the manner in which it shot "low-mould" buckshot, because said gun was the property of J. C. Ball, one of the defendants herein, but had been in the exclusive possession of the government's officials shortly after the killing of Wm T. Box, in 1889. Defendants made said request before they closed their case. It was an admitted fact that deceased, Wm. T. Box, was killed with a shotgun loaded with low-mould buckshot, held by some one at a distance of 8 or 10 feet away; that the shot penetrated his body from his shoulders to his hip; the government witness Blunt testified that the gun in court and the property of the defendant J. C. Ball would "scatter" "low-mould" buckshot badly; defendant J. C. Ball testified that he never shot "low-mould" buckshot from the gun. The fact as to how said gun

would shoot said shot was a material inquiry in this case and a practical and thorough test of said gun would have accurately settled the disputed question as to whether said gun fired the shot that killed Wm. T. Box, as claimed by the government, or whether it did not fire said shot as contended by the defendants herein.

This assignment is a proposition in itself. The evidence showed positively that if either of the plaintiffs in error killed Box, the shooting was done with the gun plaintiffs in error desired to test. The evidence further showed that the party who did the shooting sat on a corn row 8 or 10 feet from his victim. (See evidence of Joe Cross, pages 32 and 33, record; see evidence of old man Blount, page 94). The gun was the property of plaintiff in error J. C. Ball, and he had a right to demand the possession of the same, and make such tests as he saw proper to make, and then offer the evidence for what it was worth.

Authorities:

XIV.

The court erred in admitting in evidence against these defendants, and especially against the defendants J. C. Ball and R. E. Boutwell, over the objections of these defendants, the testimony of Mrs. Rider, who testified in substance as follows: "After the killing on the morning of June 27th, 1889, M. F. Ball (Filmore) told me that they were going to arrest him, but that he did not care, as he could prove out of it; that there were two men who staid all night with him by whom he could prove where he was; that they could not prove anything against him, and that they never would dream of John Ball and Bob Boutwell doing such a thing; that they would take him and try him, but as they could not prove anything against him, they would turn him loose. He said he did not see what

they were tracking around for; that they could
681 make nothing out of tracks; that he was perfectly satisfied that the tracks would exactly fit J. C. Ball and R. E. Boutwell, but so far as his tracks were concerned he was not afraid of it; he said he did not see why Joe Cross and Ed. Burney were dishing in so deep, for it was none of their business. He asked me how many shot they took out of old man Box's body. I told him, and then he said that he had shot the other load out of J. C. Ball's gun at some chickens and loaded the gun with fresh shot, and he wanted to know of me if I thought they would still think J. C. Ball's gun killed deceased. He said they were going to lay it off on an old woman there. He then told me that if he could he would call the old man back this morning as free as he ever done anything in his life. I told him it was too late. He then asked me if I had noticed anyone down there eyeing and watching him; I told him I did not, but I did see them. He asked me if he looked bad; I told him he did not; he said that he saw everybody there eyeing him all the time. He told me over a time or two about Burney and Cross tracking around there, and said if it had not been for them tracking around so much that they never would have been bothered."

And in admitting, over the objection of these defendants, the testimony of J. T. Hoover, who testified in substance as follows: "After the other trial and after M. F. Ball was acquitted, I had a conversation with him about this case. He asked me something about the boys, John Ball and Boutwell. He asked me if I knew any-
682 thing about them and how they were getting along. I told him no, but that they were in pretty bad shape, I guessed. He said, 'I guess the boys will not hang;' I said, 'I hope not if they are not guilty.' I told him he ought to do all he could for them, and he said he done about all he could do. I said something about the people thinking that they were all guilty of killing old man Box; he said the people could think and be damned; that so far as he was concerned he could go up and admit that he killed deceased; that it did not make a damn bit of difference now, as he had come clear and they could not try him for it any more," because the same was declarations made by one of the defendants, M. F. Ball, after the homicide was committed, and was not made in the presence or hearing of the defendants J. C. Ball and R. E. Boutwell, or either of them, and the same was calculated

to mislead the jury and prejudice them against said J. C. Ball and R. E. Boutwell.

This assignment will be discussed under assignment No. XVIII., record page 149.

XV.

Because the court erred in failing and refusing to give to the jury the special charges, Nos. 1 and 2, asked by the defendant M. F. Ball, and which said special charges are as follows:

"1st. If you believe from the evidence in this case that the defendant M. F. Ball is the same M. F. Ball named in indictment No. 3, introduced in evidence herein, and that a jury duly selected, empaneled, and
683 sworn to try him upon said indictment returned a verdict of not guilty against said M. F. Ball, and if you further believe from the testimony in this case that the said M. F. Ball was charged in said indictment No. 3 with the same transaction and offense as charged in the indictment in this case, i. e., if you believe that he, the said M. F. Ball, was charged in said indictment No. 3 with the shooting, wounding, killing, and murdering of Wm. T. Box, in Pickens county, Chickasaw Nation, Indian Territory, and if you further believe that Wm. T. Box was dead at the time said indictment No. 3 was returned against said M. F. Ball, and that that fact was known to the government's prosecuting officer who drew said bill of indictment No. 3, at the time he so drew the same, then you are charged that the said M. F. Ball has been once placed in jeopardy for the shooting, wounding, assaulting, killing and murdering of Wm. T. Box, and you will find the defendant's M. F. Ball's plea of former acquittal to be true and find him not guilty upon the indictment herein.

"2d. You are instructed that under the evidence and admissions in this case, the defendant M. F. Ball has been heretofore tried and acquitted of the killing and murdering of Wm. T. Box and by a valid judgment of this court discharged of said offense, which said judgment has been in no way set aside, annulled, or otherwise vacated or appealed from; you will therefore find the said M. F. Ball's plea of former acquittal and former jeopardy to be

true and acquit him herein."

684 And the court erred in his general charge, wherein he charged the jury in this case as follows, to-wit:

"The defendant Filmore Ball has further pleaded that he has been tried heretofore in this court on an indictment charging him with the murder of Box, and was acquitted. The facts are admitted that he was so tried, and he pleads former acquittal in bar of this prosecution. Upon that plea you are instructed that the Supreme Court of the United States has decided that the indictment was defective in so far as it attempted to charge the offense of murder, and the defendant's plea of former acquittal would not be good, and you would find against him. In other words, parties indicted upon a defective indictment could not plead a former conviction or acquittal; and you are instructed to find against that plea."

Because it was admitted upon the trial of this cause that the offense charged in indictment No. 3, returned into the Circuit Court of the United States in and for the Eastern District of Texas, at Paris, Texas, on the 17th day of October, A. D. 1889, by a grand jury duly empaneled in said court, which said indictment is made a part of the record in this cause and here referred to, and indictment No. 230, returned into said court on the 7th day of May, A. D. 1891, and upon which these defendants have been tried and convicted in this case, is for one and the same transaction and offense—that is to say,

685 for the killing and murdering of Wm. T. Box by the defendants herein, M. F. Ball, J. C. Ball and R. E. Boutwell, and that the said M. F. Ball, J. C. Ball and R. E. Boutwell named in said indictment No. 3 are the same M. F. Ball, J. C. Ball and R. E. Boutwell named in indictment herein, No. 230, and not other and different parties; and the uncontroverted evidence in the case, which was admitted without objection from the government, showed conclusively that the defendant M. F. Ball was tried in this court upon said indictment No. 3, and acquitted of said offense prior to the time indictment No. 230 herein was returned against him, and he, said M. F. Ball, placed once in jeopardy of life and liberty, and acquitted of said offense in a court of competent jurisdiction and by a judgment of said court, made and entered, discharged. The facts demanded this charge.

XVI.

The court erred in refusing to give to the jury the 3d special charge, asked by the defendant M. F. Ball, which is as follows:

"3d. If you believe from the testimony in this case that the deceased, Wm. T. Box, was a recognized citizen of the Chickasaw Nation at the time he was killed, and that he had, prior to that time, married a Chickasaw Indian woman under the laws of that tribe of Indians; and if you further believe that he, the said W. T. Box, was residing in said Chickasaw Nation at the time he was so killed; and if you further believe.from the testimony that the defendant M. F. Ball, prior to the time said
686 Wm. T. Box was killed, had also married a Chickasaw Indian woman, and was recognized by the Chickasaw government as a member of their tribe by virtue of said marriage with said Indian woman; and if you further believe that he was so recognized at the time Wm. T. Box was killed, and that at that time he, the said M. F. Ball, was residing in the Chickasaw Nation, Indian Territory, then you are charged that this court would not have jurisdiction to try the said M. F. Ball for the offense charged in the indictment herein, and you will find his plea to the jurisdiction of the court to be true."

And the court erred in his general charge when he charged the jury as follows: "M. F. Ball has filed a plea to the jurisdiction of this court, which states in substance that he was married to the daughter of Wm. T. Box; that Box had married an Indian woman living in the Indian country, and as a result of such marriage was the daughter whom he had married, and that consequently, under the treaty between the Indians and the United States, this court was without jurisdiction to try him. The evidence offered before you first is the marriage license issued in Cooke county, Texas, which authorizes the marriage of Miss Lucy Box, the lady that Filmore Ball afterwards claims to have married, and one Mayfield. Mrs. Mayfield, or Mrs. Ball, testified that she had never been divorced from Mayfield; that she had lived with Mayfield
687 from the time of marriage until a few months prior to her attempted marriage with the defendant, Filmore Ball. The defendant Filmore Ball introduces a marriage license, issued in the Chickasaw Nation, signed by the county judge and filed properly there, and that the

evidence attending it shows that the marriage had been performed between him and Mrs. Mayfield. You are instructed that if you believe from the evidence that Wm. T. Box, the man that was killed, was a white man, living in the Chickasaw Nation, and that he married an Indian woman, and as the result of such marriage was the lady that married Mayfield, or Ball, or both, and you believe from the evidence that she was not married to Mayfield, or that if she had been married to him that she was divorced from him, or he was dead at the time of her marriage to Filmore Ball, in that event you are instructed that the court would not have jurisdiction to try Filmore Ball in this case. But if you believe from the testimony that she married Mayfield, and that she was not divorced from him at the time of her attempted marriage to Filmore Ball, or that Mayfield was not dead, or if he was living at the time of the attempted marriage to Filmore Ball occurred and not divorced from Mayfield, in that event the marriage with Filmore Ball would be a nullity, on account of her disability to contract the marriage relations, and the court would have jurisdiction, and you would find against his plea to the jurisdiction of the court on that ground."

688 Because the testimony in the case showed that the deceased, Wm. T. Box, and the defendant M. F. Ball were each members of the Chickasaw tribe of Indians, in the Indian Territory, at the time the homicide was committed, and that they each resided there at the time Wm. T. Box was killed, and because the court in his general charge to the jury submitted to them for their determination the validity of the marriage of Lucy O. Box to C. S. Mayfield, and the marriage of Lucy O. Box or Mayfield to the defendant M. F. Ball, without any proof having been made of the laws of the Chickasaw Nation governing marriages and divorces in said Chickasaw Nation.

XVII

The court erred in refusing to give to the jury the special charge No. 4, asked by the defendants J. C. Ball and R. E. Boutwell, which said special charge is as follows:

"4th. If you believe from the testimony in this case that the defendants J. C. Ball and R. E. Boutwell are the

same identical J. C. Ball and R. E. Boutwell charged in indictment No. 3, introduced in evidence herein, and if you further believe that the said indictment No. 3 charged the said J. C. Ball and R. E. Boutwell with the same transaction and offense as the indictment herein charges them, i. e., the shooting, wounding, assaulting, killing and murdering of Wm. T. Box in the Chickasaw Nation, Indian Territory, and if you further believe from the testimony that at the time said indictment No. 3 was returned against said defendants, that the grand jury had returned the same and the government's officer who drew said
689 indictment No. 3 knew that Wm. T. Box was dead at the time they so drew said indictment, and that he died from the infliction of the gunshot wound charged to have been inflicted by these defendants, and if you further believe that the said defendants were arraigned, tried and convicted upon said indictment No. 3, by a jury duly selected, empaneled and sworn, then I charge you that the defendants J. C. Ball and R. E. Boutwell were each charged in said indictment No. 3 with an assault to kill and murder the said Wm. T. Box, and that the government of the United States, through its officers aforesaid, by presenting in this court said indictment No. 3, carved out of the shooting and wounding, killing and murdering of Wm. T. Box a lesser offense than murder, to-wit: assault to commit murder, and by the empaneling and swearing the jury to try said defendants upon said indictment and in requiring said defendants to plead thereto, the government has waived its rights to prosecute said defendants for the crime of murder and is now estopped from claiming a conviction in this case for any offense higher than assault to murder, and you will therefore find the special plea of said defendants, pleading former jeopardy and former conviction, to be true."

And the court erred in his general charge to the jury, wherein he charged them as follows: "The defendants J. C. Ball and R. E. Boutwell have filed a plea that they were tried in this court under an indictment that
690 was good for an assault with intent to kill and were found guilty of this offense, consequently the court no longer has jurisdiction to try them for murder, because they say they have been convicted of a lower degree, and therefore cannot be again convicted for murder. You will find against that plea, for the reason the Supreme Court held the indictment bad for murder and do not say

that it charged an assault to murder, and you are instructed to find against that plea."

Because it was admitted upon the trial of this cause that the offense charged in indictment No. 3 returned into the Circuit Court of the United States in and for the Eastern District of Texas, on the 17th day of October, A. D. 1889, by a grand jury duly empaneled in said court, which said indictment is made a part of the record in this cause, and here referred to and made a part hereof, and indictment No. 230, returned into said court on the 7th day of May, A. D. 1891, and upon which these defendants have been tried and convicted in this case, is for one and the same transaction and offense, that is to say, for the killing and murdering of Wm. T. Box by the defendants herein; that the said M. F. Ball, J. C. Ball and R. E. Boutwell named in the indictment No. 3 are the same M. F. Ball, J. C. Ball, and R. E. Boutwell named in the indictment herein, No. 230, and are not other and different persons, and the uncontroverted evidence in this case, which was admitted without any objection being
691 made thereto, shows that the defendants J. C. Ball and R. E Boutwell were tried upon said indictment No. 3 in the Circuit Court of the United States in and for the Eastern District of Texas, at Paris, Texas, and convicted of the offense therein charged, prior to the time indictment No. 230 herein was returned into said court; that the government's officer who drew said indictment No. 3 knew at the time he drew the same, and the grand jury was aware at the time they returned the same into this court, that the said Wm. T. Box was dead at the time, and that he died from the infliction of gunshot wounds, charged to have been inflicted upon him by these defendants; that said indictment No. 3 charged these defendants with an assault to kill the said Wm. T. Box, and the government, by the presenting of said indictment No. 3, carved out of the offense of shooting, wounding, assaulting, killing and murdering of said Box, the lesser offense of assault to kill and murder, and was thereby estopped from presenting against these defendants indictment No. 230 herein, charging them with the higher crime, to-wit: murder.

After the court admitted evidence as to the truth of the pleas filed this instruction ought to have been given.

XVIII.

The court in his charge to the jury committed a fundamental error as to the defendants J. C. Ball and R. E. Boutwell, in failing to charge the jury that the declarations of the defendant M. F. Ball as testified to by the government witnesses, J. T. Hoover and Mrs. Rider, admitted over the objections of these defendants,
692 could only be considered by them in passing upon the guilt or innocenee of the defendant M. F. Ball, and should not be considered by them in passing upon the guilt or innocence of the defendants J. C. Ball and R. E. Boutwell, because said declarations of said M. F. Ball to said Hoover and Mrs. Rider were objected to by defendants at the time the same was offered in evidence, and the testimony shows that said declarations were made by said M. F. Ball after the killing of Wm. T. Box, and that they were made by him, the said M. F. Ball, in the absence of the defendants J. C. Ball and R. E. Boutwell.

First Proposition under XVIII Assignment:

Declarations of one person charged with crime are never admissible against another, if made in the absence of the other after the commission of an alleged crime.

Authorities:

1 Greenleaf, paragraph 111.

3 Greenleaf, paragraph 94.

Second Proposition:

Where two or more parties are upon trial and proof of declarations of one are admitted, over the objection of others jointly indicted and upon trial, it is the duty of the court to limit said testimony in its charge.

Authorities:

Jones Case, 31st Gratt., (Va.) 836.

2 Bishop's Crim. Pro., Sec. 230.

3 Greenleaf, Sec. 33 and 94.

Com. vs. Ratcliff, 130 Mass., Rep., p. 36.

Miller vs. Com., 78 Ky. Rep., 15.

Heine vs. Com., 91 Pa. St., 145.

Wilson vs. The People, 94 Ill., 299.

ARGUMENT.

The testimony of Hoover and Mrs. Rider was self-served and proved nothing against M. F. Ball that tended to make him a principal. But his declarations were very damaging to J. C. Ball and R. E. Boutwell. She testified as follows:

Q. Say anything after the killing?

342 A. Only what he told me on the morning of the 27th; he told me that they was going to arrest him; that he did not care; that he could prove out of it.

Q. What was that he said?

A. He said on the morning of the 27th that they was going to arrest him that morning; that he did not care if they did, he could prove out of it; that there was two men that staid all night with him that could prove where he was; that they could not prove anything against him, and that they never would dream of John Ball and Bob Boutwell doing such a thing; that they would take him and try him and could not prove anything against him, and they would turn him loose.

Q. Go ahead.

A. He said he did not see what they were tracking around for; that they could not make nothing out of tracks; that he was perfectly satisfied that the tracks would just exactly fit John and Bob, but so far as his tracks were concerned he was not at all afraid of it; he said that he did not see why Joe Cross and Ed. Berney

was dishing in so deep for; that it was none of their business; that if it had not been for Joe Cross and Ed. Berney they would not have said anything about it, and they would not have been bothered. Then he asked me about how many shots they got out of the old man; I told him; he said he shot the other load at some chickens and loaded the gun with fresh shot, and he wanted to know if
343 I thought they would still think John's gun killed the old man; he said they was going to lay it off on an old lady there.

Q. What did he say about the other track?

A. He said that there was more than one foot that made a big track; that Huse Graves' track would just fit the big track. Then he told me if he could he would call the old man back this morning as quick as he ever did anything in his life. I told him it was too late. Then he asked me if I noticed everybody down there eyeing him and watching him.

A. I told him I did not; but I did see them. He asked me if I thought he looked bad. I told him that I did not. Then he said he saw everybody there eyeing him all the time.

Plaintiffs in error J. C. Ball and R. E. Boutwell objected to the introduction of the above evidence as against J. C. Ball and R. E. Boutwell. The court admitted the evidence over the objection, saying at the time to plaintiffs' counsel: "Of course it will only be evidence against Filmore if he said anything." (See record, page 96). This evidence was very strong against plaintiffs J. C. Ball and R. E. Boutwell, and left to the jury to consider it as it was without any qualification, must have injured the substantial rights of plaintiffs in error J. C. Ball and R. E. Boutwell.

The court's remarks above quoted as addressed to counsel could not be regarded as a qualification of said evidence. It placed no limit on it so far as the jury was concerned and it now fully appears that the jury considered

said evidence just as they did the other evidence, at least nothing to the contrary appears in the record.

The court having admitted the evidence as against M. F. Ball, it was its imperative duty to qualify the same by its general charge and a failure to do so was fundamental error for which this cause ought to be reversed, as to J. C. Ball and R. E. Boutwell. Jones Case 31 Gratt. (Va.) 836, states the correct doctrine; the court said in that case: "But on a joint trial of two for conspiracy, declarations of one, made after the design was completed and abandoned, are admissible, because they tend to connect him with the conspiracy; but the judge should instruct the jury that these declarations have no weight to prove the other guilty of conspiracy." The court failed to instruct in keeping with the principle here announced; hence error.

XIX.

The court erred in permitting the jury, after this case had been submitted to them, to come into court during the absence of all of these defendants and demand from the court the reproduction of the testimony of H. H. Kirkpatrick and Tony Hertz from the notes of the stenographer, and in telling the jury, in the absence of these eefendants, "I will have the stenographer to extend the testimony from her notes and will let you know when I get it ready." And the court erred in having said testimony so extended to the jury after this case had been submitted to them, without the knowledge or consent of either of these defendants or their attorneys, be
693 cause said typewritten copy of the testimony of said witnesses, so delivered to the jury by the court, was not verified by the oath of said stenographer, and the court, by delivering said typewritten testimony to the jury, presented to said jury other and further testimony for

their consideration after the case had been submitted to them, and he thereby presented to said jury said testimony in the absence of the these defendants, thereby denying them the right of cross-examining said witnesses, and the court thereby presented to said jury other and further testimony in a manner and from a source not authorized by law and in violation of the Constitution of the United States, guaranteeing that in criminal prosecutions the accused shall be confronted with the witnessses against him.

Proposition.

No evidence could be delivered to the jury in the absence of plaintiffs in error before or after the jury retired to consider of the verdict.

Authorities:

Loan Co. vs. Mix, 51 N. Y. 558.

Burn vs. Croul, 10 Johnson, 238.

2 Thompson on Trials, Sec. 2555.

The consent or even request of counsel to deliver evidence to the jury could not effect the rights of plaintiffs in error.

XX.

These defendants have not been convicted by due process of the law of the land in this: The jury that returned the verdict of guilty against the defendants in this case was not placed in charge of a duly sworn bailiff of this court after they were empaneled and charged with this case until they returned a verdict of guilty against these defendants, but, upon the contrary, said jury was in the exclusive control of Drumgoole Williams from the time they were empaneled until they returned their said verdict,
693 without any oath whatever being administered to him, the said Drumgoole Williams, as such special bailiff, all of which will be made apparent by an inspection of the record in this cause, here referred to and made a part hereof.

The record shows that Drumgoole Williams who had the jury in charge was not a sworn bailiff as required by law. See record page.

Authorities:

1st Bishop's Crim. Pro. 991 and 992.

XXIII.

The court erred in not granting the defendant M. F. Ball a new trial on account of the newly discovered evidence of J. L. Keeler, the marriage license of C. S. Mayfield to Louisa Rodgers, and a certified copy of the record of the divorce proceedings of Louisa Mayfield vs. C. S. Mayfield, had in the district court of Cooke county, Texas, all of which fully appears in the record in this case, here referred to and made a part hereof; because said defendant M. F. Ball had no notice prior to the trial of this cause that the Government would introduce in evidence the marriage license of C. S. Mayfield and Lucy O. Box, the wife of said defendant, and in that way attempt to show that said defendant M. F. Ball was not legally married to Lucy O. Box, alias Mayfield, a Chickasaw Indian woman, and thereby establish the fact that this court had jurisdiction to try said M. F. Ball, and because said newly discovered evidence showed conclusively that said M. F. Ball was lawfully married to said Lucy O. Box, alias Mayfield, and the deceased being a member of the Chickasaw
696 tribe of Indians, this court did not have jurisdiction to try the said M. F. Ball for murdering said deceased.

Proposition.

After conviction if it is made to appear to the court trying a criminal case that the court had no jurisdiction, a new trial should be granted, and the prisoner discharged.

Authorities:

Ex-parte Lange, 18 Wall. 163.

" Weiginid, 100 U. S., 339.

" Mills, 135 U. S., 107.

The evidence offered by the government upon the trial showed positively that the deceased Box was an Indian citizen by adoption.

He having married an Indian woman and lived in the Territory for many years with her as his wife. Plaintiff in error M. F. Ball proved on the trial that he married a daughter of deceased Box. The government, without any notice to M. F. Ball, proved by certified copy of marriage license that Miss Lucy Box, now M. F. Ball's wife, was married to one Mayfield before she married Ball and that she had not been divorced at the time she married M. F. Ball, this proof under the charge of the court forced the jury to find against M. F. Ball's plea to the jurisdiction. See charge of the court, Record page 129. After the conviction, plaintiff in error M. F. Ball discovered the real fact to be at the time Mayfield married Miss Lucy Box, he, Mayfield, had a living wife and a divorce suit then pending in Cooke county, Texas. This undisputed proof showed the marriage between Mayfield and Miss Box to be invalid; hence she could marry M. F. Ball at the time see did and the marriage was valid and constituted Ball a citizen of the Chickasaw Nation, therefore the court had no jurisdiction to try M. F. Ball for the murder of Box.

XXV

The court erred in overruling the seventeenth (17) ground in the motion for a new trial made by the defendant M. F. Ball, which is as follows, to-wit: "Because the verdict of the jury finding this defendant guilty of the murder of Wm. T. Box is contrary to the law as given in charge by the court, is contrary to the evidence

adduced, and is without evidence to support it in this: the testimony conclusively shows that if this defendant is guilty of any offense he is guilty as an accessory and not as a principal offender in the killing of Wm. T. Box."

XXVI.

698 The defendant M. F. Ball has not been tried by due process of the law of the land in this: He was indicted, tried, convicted and sentenced to death upon an indictment charging him, the said M. F. Ball, with being a principal offender in the killing and murdering of Wm. T. Box, when all of the evidence, which is made a part of the record in this case, here referred to and made a part hereof, shows conclusively that *that* the said M. F. Ball was not present when the said Box was killed; that he, the said M. F. Ball, was doing no act at the time said Box was killed in furtheranceo f a common design of these defendants or any one else to kill deceased; but the testimony shows conclusively that the said M. F. Ball, at the very time the shot was fired that killed deceased, was at a house a half mile away playing a fiddle for parties at a dance; and said testimony shows that the said defendant M. F. Ball was not a principal offender in the killing of said Box, but if guilty of any offense he was guilty as an accessory to said killing.

Assignments 25 and 26 will be considered together. The proposition is fully stated in the assignments.

If the evidence offered on the trial and now contained in the record shows plaintiff in error M. F. Ball to be an accessory, then the present conviction cannot stand. Because said indictment upon which the conviction was had charges M. F. Ball as a principal.

Authorities:

1st Bishop's Criminal Law, Secs. 653, 663.

Hughes vs. State, 12 Ala., p. 458.

Hately vs. State, 15 Ga., p. 345.

ARGUMENT.

It was the intention of the solicitor general and counsel for plaintiffs in error to have incorporated in the record all the evidence that tended to show M. F. Ball's connection with the murder before, at the time and after it was committed. Proceeding upon the theory that all the evidence connecting plaintiff in error M. F. Ball with the murder of deceased, Box, is contained in the record before the court, we insist that the same is insufficient to sustain the conviction of M. F. Ball as a principal, but that the same shows M. F. Ball to be an accessory.

We will not now undertake to analize the evidence further than to show that the undisputed evidence shows that M. F. Ball was not present at the time of the killing of Box, but was at R. E. Boutwell's house. (See evidence of Bud Ashly, record page 59): "M. F. Ball was in the house playing the fiddle."

N. B.—The house was about one thousand yards from where Box was killed. (See testimony of Joe Cross, record page 35). The testimony of Miss Nannie Blount, record pages 90, 91 and 92, shows positively that at the time she heard the report of a gun that must have been the gun that killed Box, plaintiff in error M. F. Ball was playing the fiddle for the set she was dancing at the time the gun fired.

It will be contended by the prosecution that the proof shows that M. F. Ball was doing acts just about the time the shooting took place to prevent the crowd at the dance

from dispersing. Grant that he was; will this fact sustain the present judgment finding him guilty as a principal? We think not. Mr. Bishop, and other authorities of high repute, declare the test to be: "If the will of such other individual contributed to the act, the test to determine whether the law deems him a principal rather than an accessory is whether he was so near or otherwise so situated as to make his personal help, if required to any degree, available." Certainly it cannot be said that the proof upon which plaintiff in error M. F. Ball was convicted shows that he was so near the killing of Box, or was so situated as to give any personal help or aid to those engaged in the act of murdering Box. The evidence is undisputed that M. F. Ball was not present at the killing of deceased Box. The situation of plaintiff in error at the very moment of the killing is shown, which make it absolutely impossible for him to have rendered any personal help or aid to those engaged in killing Box. We therefore conclude that whatever connection M. F. Ball may have had with the murder of Box, or complicity in or conspiracy to murder Box. The proof wholly fails to show that M. F. Ball is guilty as a principal, and the present conviction cannot stand without doing violence to the substantial legal right of plaintiff in error M. F. Ball. This case ought therefore to be reversed on the above assignment.

Plaintiffs in error filed motion in arrest of Judgment as follows:

THE UNITED STATES
vs.
M. F. BALL ET AL. } No. 230.

Now comes the defendants, M. F. Ball, J. C. Ball and R. E. Boutwell, and leave of the court first had and obtained, file their amended motion in arrest of judgment in lieu of their motion filed herein on the 17th day of May, A. D. 1894, and each move the court to arrest the judgment heretofore entered against them, adjudging them guilty of murder, because the indictment in this
35 case upon which these defendants were tried and convicted is insufficient in law and fatally defective in the following particulars, viz:

I.

Said indictment fails to allege that Wm. T. Box died of the mortal wounds inflicted by these defendants in and upon his body.

II.

Said indictment fails to give a discription of the mortal wounds inflicted in and upon the body of Wm. T. Box by these defendants, and fails to allege upon what portion of his body said mortal wound was inflicted.

III.

Said indictment fails to allege that the offense with which these defendants stand charged was committed at a place within the sôle and exclusive jurisdiction of this court.

IV.

Because there is no allegation in the indictment showing that this court has jurisdiction to try these defendants for the offense alleged, in that it does not aver that the deceased, Wm. T. Box, and each of these defendants were not members of any tribe of Indians in the Indian Territory by marriage or adoption.

V.

Because there is no allegation in the indictment that Wm. T. Box died withing the jurisdiction of the
36 Eastern District of Texas.

Wherefore these defendants pray that the judgment heretofore entered against them be arrested, set aside, and held for naught, and that the indictment herein be quashed.

HODGES & NICHOLS and
J. M. LONG,
Attorneys for Defendants, M. F. Ball,
J. C. Ball and R. E. Boutwell.

Plaintiffs in error, in their first assignment of error, say the court erred in overruling this motion in arrest of judgment. The motion as above copied, presents the sufficiency of the indictment without copying the assignment of error here.

For convenience, we here copy charging part of indictment from record, page 1 and 2:

"On their oath in said court present: That one M. F. Ball and one J. C. Ball and one R. E. Boutwell, late of Chickasaw Nation, Pickens county, Indian Territory, in the district and circuit aforesaid, on the twenty-sixth day of June, in the year of our Lord eighteen hundred and eighty-nine, in Pickens county, in the Chickasaw Nation, in the Indian Territory, the same being annexed to and constituting a part of the said fifth circuit, and an-
4 nexed to and constituting a part of the Eastern District of Texas, for judicial purposes, and being within the jurisdiction of this court, did unlawfully, fraudulently, and feloniously, and with their malice aforethought, and with the malice aforethought of each of them, and with a certain deadly weapon, to-wit: a certain gun by the said M. F. Ball, J. C. Ball and R. E. Boutwell, then and there held, make an assault in and upon the body of one William T. Box, with said gun held as aforesaid, said gun being then and there loaded and charged with gunpowder and leaden balls, then and there held and used as aforesaid, the said M. F. Ball, J. C. Ball and R. E. Bout-

well did then and there shoot off and discharge the contents of said gun at, in, and upon the body of said William T. Box, inflicting thereon a mortal wound, of which mortal wound the said William T. Box did languish, and languishing did then and there instantly die, and did then and there die within a year and a day after the infliction of the said mortal wound as aforesaid.

And the said grand jurors aforesaid, upon their oaths aforesaid, do say that upon the day aforesaid, at the place aforesaid, with said deadly weapon aforesaid, in the manner aforesaid, and used as aforesaid, the said M. F. Ball, J. C. Ball and R. E. Boutwell, did unlawfully, feloniously, and with their malice aforethought, kill and murder the said William T. Box; the said M. F. Ball, J. C. Ball and R. E. Boutwell, and each of them being then and there white persons, and not Indians nor citizens of the Indian Territory, contrary to the form of the statute in such cases made and provided, and against the peace and dignity of the United States of America."

Is this indictment such an indictment as would sustain a conviction and judgment at common law for the offense of murder? If so, the motion in arrest was properly overruled. But if the indictment is not such an indictment as is necessary to sustain a conviction, and judgment for murder at common law, then this court ought to reverse this case and order the prosecution dismissed.

We now undertake to show the court that the indictment upon which plaintiffs in error were convicted is not good.

Proposition.

Every ingredient of which an offense is composed must be accurately and clearly charged. This is elementary.

1st. The indictment fails to allege the place of death. It is not charged to have taken place within the jurisdic-

tion of the court. This is an essential allegation. (See 1st Wharton's Crim. Law, 9th Ed., Sec. 538; Ball vs. U. S., 140, page 118). Place must be avered. The indictment at common law should also aver that the deceased died in the county in which the indictment is found. Where the stroke is at one time or place and the death at another, if the day be especially alleged it should be that on which the party died and not that on which he was stricken, for until he died it was no murder. (Wharton on Homicide, 2d Ed., Sec. 846).

The charge that "of which mortal wound the said William T. Box did langush, and languishing did then and there instantly die, and did then and there die within a year and a day after the infliction of the said mortal wound as aforesaid," is not sufficient. Said language does not charge that Box died in the Indian Territory and within the jurisdiction of the Federal Court, Eastern District of Texas.

The indictment does not charge that said Box did then and there languish, but it charges: "Said William T. Box did languish, and languishing did then and there instantly die." This language does not allege where Box languished, but it imports that he lived after the mortal wound was inflicted, and after languishing did then and there instantly die, i. e. at the place where he languished. The language used by the pleader, "did languish and languishing did then and there instantly die," clearly imports some lapse of time after the reception of the mortal wound before death occurred. The words "then and there" em-

ployed in the sentence and used after the words "did languish," and refer to the time of the languishing and not to the time of the infliction of the mortal wound. It would be impossible for a wounded man to languish and instantly die at the same time, because to languish means to live. Mr. Webster says to languish means "to become languid or weak, to sink away, to lose strength or animation, to be or become dull, weak or spiritless; to pine; to be or grow heavy." How long Box lived after receiving the mortal wound is not stated, other than that he died within a year and a day after receiving the wound. If the pleader intended to charge that Box instantly died from the effects of the mortal wound, why charge that he died within a year and a day after receiving the mortal wound? The allegation "did then and there instantly die" would be within a year and a day if the words "languish and languishing" had not been used. But the plain import of the language, all taken together, is plain: 1st. Box was wounded on the 26th day of June, 1889, in Pickens county, Indian Territory. 2d. Box languished and after languishing some time, he then and there, i. e. where he languished, did instantly die, and the time of death was on some date not named, but within less than a year and a day after the wound was inflicted.

This construction of the language used in the indictment gives force to every word employed, any other construction must necessarilly destroy either the language "languish and languishing," or the words "did instantly die."

Indictments are always construed against the pleader, and if effect can be given to all parts of any written instrument, it should be so construed as to give such effect. "A charge that A on such a day, at etc., made an assault upon B, and him with a knife, feloniously struck, killed and murdered, was held not to import sufficiently that the stroke was at the same time and place as the assault for want of the words 'then and there.'"

1st Russell on Crimes, 2 Am. Ed., Marg. p. 470.

1 Wharton's Cr. Law, 6th Ed., Sec. 272.

1 Bishop's Cr. Pro., 3d Ed., Secs. 407, 413.

The languaged used in the indictment, "did instantly die," is not sufficient.

1 Wharton's Cr. Law, 6th Ed., Sec. 272.

1 Bishop's Cr. Pro., 3d Ed., Sec. 409.

Laster vs. State, 9 Mo., 658.

2d. Said indictment fails to allege that Box died of the wounds charged to have been inflicted. The language, "of which mortal wound the said William T. Box did languish and languishing did then and there die," is not sufficient. Box may have died from causes other than the wound, and yet if all the allegations in the indictment be true it does not say he died of the wound. It does charge that he languished of the mortal wound.

From the earliest writers of the common law to the present day no precedent of indictment for murder can be found that does not distinctly and clearly charge the death to have resulted from the wound or bruise inflicted. It

must be alleged that the wound was mortal and that the party died of the mortal wound.

1st Starke's Crim. Pl., 93.

In all cases the death by the means stated must be positively alleged and cannot be taken by implication and therefore where the means of death is alleged to be by a stroke, the indictment should proceed to aver that the prisoner thereby gave to the deceased a mortal wound of which he died.

1 East P. C., 342.

1 Arch. Cr. and Pl. Pomeroy's Ed., p. 791.

Anon 1 Roll. Rep., 137.

Hawk T. C. Bk. Sec. 83.

Chit. Crim. Law, 736.

British Crim. Cases, 298.

United States vs. Cruikshank, 92 U. S., 542.

If the indictment may be true and still the accused may not be guilty of the offense as it is described in the law, the indictment is insufficient.

Com. vs. Young, 15 Grat., 664.

32 Fed. Rep., page 694.

U. S. vs. McCormick, 1 Crouch C. C., 593.

12 Myer's Fed. Decisions, Sec. 2078.

In the present case the indictment may be true and plaintiffs in error not guilty of murder. Box may have been mortally wounded by a gunshot wound fired by plaintiffs in error. He may have languished of the wound and died, but not of the mortal wound inflicted.

United States vs. Carel, 105 U. S., 611.

United States vs. Simmons, 99 U. S. 360.

United States vs. Hess, 124 U. S., 483.

The rule, says Mr. Clifford, J., in U. S. vs. Crook, 17 Wallace, 174, is universal that every ingredient of which the offense is composed must be accurately and clearly stated in the indictment, or the indictment will be quashed on motion, or the judgment may be arrested or reversed on error.

Edmonds vs. State, 41 Tex. Rep., 496.

The State vs. Blan, 69 Mo., 317, 322.

People vs. Wallace, 9 Cal., 30.

People vs. Loyd, 9 Cal., 54.

It is well settled that the defect being matter of substance and not of form only is not cured by verdict and advantage may be taken of the omission by motion in arrest of judgment. 105 U. S., 611. and 124 U. S., 483, already cited.

Criminals courts of law are not at liberty to make intendments and inferences to support indictments in the same manner as they may do to support civil actions.

United States vs. Davis, 5 Mason, 356.

United States vs. Slenker, 32 Fed. Rep., 691.

The want of specific material allegations is not aided by the concluding summary in the indictment.

Shaffer vs. State, 35 N. W. Rep., 372.

Fouts vs. Territory, 8 O. St., 98.

We beg to call the attention of the court to the fact

that the original record filed in this court shows that plaintiffs in error duly excepted to the errors herein presented, at the trial of this case in the court below. Wherefore plaintiffs in error pray that this court do hear and reverse this case, with such other orders as in law and justice they are entitled.

J. C. HODGES,
C. H. SMITH,
A. J. NICHOLS,
For Plaintiffs in Error.

Office Supreme Court
FILED
MAR 7 18
JAMES H. McKENN

IN SUPREME COURT

FOR THE UNITED STATES OF AMERICA,

OCTOBER TERM, 1895.

No. 461.

M. F. BALL, J. C. BALL, and R. E BOUTWELL,
Plaintiffs in Error.

Versus,

THE UNITED STATES,
Defendant in Error.

Error to the Circuit Court of the United States for the Eastern District of Texas.

Brief of J. C. HODGES,
And C. H. SMITH,
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P. H. Bonnett, Print. Paris, Texas.

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Office Supreme Court U. S.
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IN SUPREME COURT

FOR THE UNITED STATES OF AMERICA,

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IN SUPREME COURT

FOR THE UNITED STATES OF AMERICA,

OCTOBER TERM, 1895.

No. 812.

M. F. BALL, J. C. BALL, and R. E BOUTWELL,

Plaintiffs in Error.

Versus,

THE UNITED STATES,

Defendant in Error.

Error to the Circuit Court of the United States for the Eastern District of Texas.

General Statement:

On October 17, 1889, plaintiffs in error were indicted in the Circuit Court of the Eastern District of Texas, for the murder of William T. Box, on June 26, 1889, in Pickens county, I. T., it being indictment No. 3 in said court. On November 3, 1889, after a trial, a verdict was returned, finding J. C. Ball and R. E. Boutwell guilty as charged in the indictment, and M. Filmore Ball not guilty,

and an order was entered that J. C. Ball and R. E. Boutwell were guilty as charged in the indictment, and remanding them to custody, and that M. F. Ball be discharged. On November 15, 1889, J. C. Ball and R. E. Boutwell were ordered executed, but no day was named for the execution and no death warrant ordered. On June 18, 1890, J. C. Ball and R. E. Boutwell were again sentenced to be hung. (Record, page 124).

From the order of June 18, 1890, J. C. Ball and R. E. Boutwell sued out a writ of error and brought their cases to this court. On April 27, 1891, this court, in an opinion reported in 140 U. S. Reports, 118, held that the orders of November 15, 1889, and of June 18, 1890, were erroneous, in that they do not disclose that plaintiffs in error were present when they were entered; that the indictment in said cause, failing to allege when the deceased died, was insufficient to charge murder, but sufficiently charged assault, and ordered that "the judgments are reversed and the cause remanded, with a direction to quash the indictment, and for such further proceedings in relation to the defendants as to justice may appertain." On November 21, 1891, indictment No. 3 was dismissed.

On May 7, 1891, plaintiffs in error were again indicted for the murder of William T. Box on June 26, 1889, in the Indian Territory, it being indictment No. 230 in said court. On April 23, 1894, M. F. Ball filed a plea of *autre fois acquit*, to said indictment, setting up the identity of the offense charged and his acquittal on in-

dictment No. 3, and that William T. Box was dead when indictment No. 3 was returned, an that an offense is well charged in the same, on the same day J. C. Ball and R. E. Boutwell filed their pleas of *autre fois convict* to said indictment, setting up therein the identity of the offenses charged and their conviction on indictment No. 3, their confinement in jail until indictment No. 230 was presented; that an offense is well charged in indictment No. 3; that William T. Box was dead when indictment No. 3 was returned, and that the government had carved one offense out of the transaction. On May 1, 1893, on motion of the district attorney to strike out said pleas and demurring to them on account of the insufficiency of indictment No. 3, the Circuit Court overruled and denied said pleas.

On April 30, 1894, M. F. Ball filed a plea to the jur isdiction of the court, alleging that he and the deceased were both members of the Chickasaw tribe of Indians.

On May 1, 1894, the several motions of plaintiffs in error for severance were denied, and a trial had, which resulted in a verdict on May 5, 1894, against all special pleas and the conviction of all three of the plaintiffs in error of murder.

Motions for new trial and in arrest of judgment were filed and overruled by the court and plaintiffs in error sentenced to death. Plaintiffs in error excepted, filed petition for writ of error, assigned errors and bring their

cases to this court for review. Record, pages 3 to 16, inclusive, will verify the statement here made.

We will first consider the third and fifteenth assignments of errs together.

Assignment of Error:

II.

"The court erred in sustaining the motion made by the district attorney to strike out the special plea of former jeopardy and former acquittal of the defendant M. F. Ball filed herein on the 25th day of April, A. D. 1894, which said special plea and motion to strike out the same are made parts of the record herein, here referred to and made a part hereof, (Record, pp. 3, 9 and 11) because said special plea showed that the said defendant M. F. Ball had, before the indictment in this case had been presented in this court, been legally tried by a jury duly and legally empaneled in a court of competent jurisdiction, to-wit: in the Circuit Court of the United States, in and for the Eastern District of Texas, at Paris, Texas, for the same offense charged against him in this cause, to-wit: for the shooting, wounding, killing and murdering of William T. Box, and by said jury found not guilty of said offense, and by said court discharged by its judgment entered of record." (Record, 140).

Assignment of Error:

XV.

"Because the court erred in failing to give to the jury the special charges Nos. 1 and 2, asked by the defendant M. F. Ball, and which said special charges are as follows:

"1st. If you believe from the evidence in the case that the defendant M. F. Ball is the same M. F. Ball named in indictment No. 3 introduced in evidence herein, and that a jury duly selected, empaneled and sworn to try him upon said indictment returned a verdict of not guilty against said M. F. Ball, and if you further believe from the testimony in this case that the said M. F. Ball was charged in said indictment No. 3 with the same transaction and offense as charged in the indictment in this case, i.e., if you believe that he, the said M. F. Ball, was charged in said indictment No. 3 with the shooting, wounding, killing and murdering of Wm. T. Box, in Pickens county, Chickasaw Nation, Indian Territory, and if you further believe that Wm. T. Box was dead at the time said indictment No. 3 was returned against said M. F. Ball, and that that fact was known to the government's prosecuting officer who drew said bill of indictment No. 3, at the time he so drew the same, then you are charged that the said M. F. Ball has been once placed in jeopardy for the shooting, wounding, assaulting, killing and murdering of Wm. T. Box, and you will find the defendant M. F. Ball's

plea of former acquittal to be true and find him not guilty upon the indictment herein." (See Record, p. 133).

"2d. You are instructed that under the evidence and admissions in this case, the defendant M. F. Ball has been heretofore tried and acquitted of the killing and murdering of Wm. T. Box, and by a valid judgment of this court discharged of said offense which said judgment has been in no way set aside, annulled, or otherwise vacated or appealed from; you will therefore find the said M. F. Ball's plea of former acquittal and former jeopardy to be true and acquit him herein." (See Record, p. 134).

And the court erred in his general charge, wherein he charged the jury in this case as follows, to-wit:

"The defendant Filmore Ball has further pleaded that he has been tried heretofore in this court on an indictment charging him with the murder of Box, and was acquitted. The facts are admitted that he was so tried, and he pleads former acquittal in bar of this prosecution. Upon that plea you are instructed that the Supreme Court of the United States has decided that the indictment was defective in so far as it attempted to charge the offense of murder, and the defendant's plea of former acquittal would not be good, and you would find against him. In other words, parties indicted upon a defective indictment could not plead a former conviction or acquittal, and you are instructed to find against that plea." (See Record, p. 129).

Because it was admitted upon the trial of this cause that the offense charged in indictment No. 3, returned into

the Circuit Court of the United States, in and for the Eastern District of Texas, at Paris, Texas, on the 17th day of October, A. D. 1889, by a grand jury duly empaneled in said court, which said indictment is made a part of the record in this cause and here referred to, and indictment No. 230, returned into said court on the 17th day of May, A. D. 1891, and upon which these defendants have been tried and convicted in this case, is for one and the same transaction and offense—that is to say, for the killing and murdering of Wm. T. Box by the defendants herein, M. F. Ball, J. C. Ball and R. E. Boutwell, and that the said M. F. Ball, J. C. Ball and R. E. Boutwell, named in indictment No. 3, are the same M. F. Ball, J. C. Ball and R. E. Boutwell named in indictment herein No. 230. and not other and different parties; and the uncontroverted evidence in the case, which was admitted without objection from the government, showed conclusively that the defendant M. F. Ball was tried in this court upon indictment No. 3, and acquitted of said offense prior to the time indictment No. 230 herein was returned against him, and he, said M. F. Ball, placed once in jeopardy of life and liberty and acquitted of said offense in a court of competent jurisdiction and by a judgment of said court, made and entered, discharged. (Record, page 145).

Statement:

M. F. Ball's sworn plea of *autre fois acquit* was as

follows: "And now comes M. F. Ball, one of the defendants in the above cause, and for special plea herein says:

First. That heretofore, on or about the 30th day of November, A. D. 1889, he was tried and acquitted at Paris, Texas, in a court of competent jurisdiction, to-wit: In the Circuit Court of the United States, for the Eastern District of Texas, upon and indictment, numbered 3 in said court, duly and legally presented therein, charging this defendant jointly with J. C. Ball and R. E. Boutwell, with the same identical offense that is charged in indictment No. 230 herein, and upon which he is now called to answer. That indictment No. 3, aforesaid, charged this defendant and his co-defendants with the same identical overt acts, i.e., shooting William T. Box, that they are now charged with in indictment No. 230 herein.

Second. That he was duly arraigned and pleaded not guilty to the charge in the said indictment No. 3; that thereupon he was tried before a jury of twelve men, duly and legally selected, empaneled, and sworn to try the issue so joined, in the United States Circuit Court for the Eastern District of Texas, holding session at Paris, Texas, and being the court wherein said indictment was duly and legally presented by a grand jury duly organized by said court.

Third. That on the 3d day of November, A. D. 1889, the jury so selected, empaneled, and sworn, after hearing the evidence and the charge of the court, returned into court the following verdict, to-wit: 'We, the jury,

find the defendants J. C. Ball and R. E. Boutwell guilty, as charged in the indictment, and we find M. Filmore Ball not guilty. A. P. Ball, Foreman. Nov. 3d, 1889.' The court received and filed said verdict, and then and there rendered its judgment as follows: "It is therefore ordered by the court that the defendants, J. C. Ball and R. E. Boutwell, are guilty as charged in the indictment herein and as found by the jury, and it is ordered that they be remanded to the custody of the Marshal, and be by him committed to the county jail of Lamar county to await the judgment and sentence of the court. It is further ordered that the defendant M. F. Ball be discharged and go hence without day." All of which proceedings appear upon the record of said United States Circuit Court in and for the said Eastern District of Texas, holding sessions at Paris, Texas, certified copies of said entries are hereto attached, marked "Exhibit A," and made a part hereof; which said judgment was never vacated, annulled, or set aside in any way.

Fourth. Defendant shows to the court that said indictment No. 3 aforesaid was a good and valid indictment, and charged this defendant with the commission of a felony, and in so charging charged this defendant with the same overt acts, to wit, the shooting of William T. Box, that are charged in the indictment No. 230 to which affiant now pleads.

Wherefore affiant pleads former jeopardy and former acquittal upon the same identical offense charged in the indictment in this cause.

Fifth. Defendant says that if he is mistaken as to the bill of indictment No. 3 as aforesaid, charging him and his co-defendants with the same offense charged in indictment No. 230, and the court should hold that indictment No. 3 only charged this defendant and his co-defendants with assault with intent to kill William T. Box. Then this defendant for special plea in this behalf shows to the court that the shooting and wounding William T. Box, charged in said indictment No. 3, is the same identical shooting that is charged in indictment No. 230 and is one and the same transaction; and that the said William T. Box died before the filing of the indictment No. 3 against the defendant and his co-defendants, and which fact was known to the District Attorney who drew the bill of indictment and to the Grand Jury that presented such indictment No. 3, and that by the terms of said indictment this defendant was charged with assault with the intent to kill said William T. Box, and was tried in said court and acquitted of said offense of assault to kill and all other offenses charged in said indictment. This defendant therefore charges that the United States, by its legally constituted Grand Jury, District Attorney, and Circuit Court as aforesaid, in the manner aforesaid, and without the consent of this defendant, carved out of the shooting of William T. Box the offense of an assault to kill, and tried this defendant, of which said offense he was duly and legally acquitted.

Wherefore he pleads said acquittal in bar of any further prosecution for the alleged shooting of William T.

Box, in said two indictments. (Rec. 3.)

The charging part of indictment No. 3 is, "that one M. F. Ball and one J. C. Ball and one R. E. Boutwell, whose names are to the Grand Jurors otherwise unknown, late of the county of Pickens, in the Chickasaw Nation, in the Indian Territory, the same being annexed to and constituting a part of said Fifth Circuit, and annexed to and constituting a part of the Eastern District of Texas, for judicial purposes, and being within the jurisdiction of this court did unlawfully, fraudulently, and feloniously and with malice aforethought, and with a certain deadly weapon aforesaid, in the manner aforesaid, and used as aforesaid, did unlawfully and feloniously, and with malice aforethought, and the malice aforethought of each of them, did kill and murder the said William T. Box. The said M. F. Ball and J. C. Ball and R. E. Boutwell, and each of them being there white men and not citizens of the Chickasaw Nation or of the Indian Territory, or any nation or tribe thereof, contrary to the form of the statutes of the United States of America, in such cases made and provided, and against the peace and dignity of the United States of America. (Rec. 8.)

The order and verdict returned on indictment No. 3 is:

"Sunday, November 3rd, 1889.

This day came the United States by her attorney, and the defendants in their own proper persons and by attorneys came, and the jury of twelve good and lawful men

which heretofore had been tried, empannelled and sworn as required by law, and having heard the evidence and argument of counsel and received the charge of the court, and having on a former day of this term retired to consider of their verdict, on this day brought into open court their verdict in words and figures as follows, to-wit:

"We the jury find the defendants J. C. Ball and R. E. Boutwell guilty as charged in this indictment, and we find M. Fillmore Ball not guilty. Nov. 3rd, 1889. A. P. Ball, Foreman."

It is therefore considered by the court that the defendants J. C. Ball and R. E. Boutwell are guilty as charged in the indictment herein and as found by the Jury, and it is ordered that they be remanded to the custody of the Marshal and be by him committed to the County Jail of Lamar County to await the judgment and sentence of the court.

It is further ordered that the defendant M. F. Ball be discharged and go hence without day." (Rec. 5).

The charging part of indictment No. 230 is "That one M. F. Ball and one J. C. Ball and one R. E. Boutwell, late of Chickasaw Nation, Pickens County, Indian Territory, in the District and Circuit aforesaid, on the twenty-sixth day of June, in the year of our Lord eighteen hundred and eighty nine, in Pickens County, in the Chickasaw Nation, in the Indian Territory, the same being annexed to and constituting a part of the said Fifth Circuit, and annexed to and constituting a part of the Eastern District of

Texas, for judicial purposes, and being within the jurisdiction of this court did unlawfully, fraudulently, and with their malice aforethought, and with the malice aforethought of each of them, and with a certain deadly weapon, to-wit, a certain gun by the said M. F. Ball, J. C. Ball, and R. E. Boutwell then and there held, make an assault in and upon the body of one William T. Box, with said gun held as aforesaid, said gun being then and there loaded and charged with gunpowder and leaden balls, then and there held and used as aforesaid, the said M. F. Ball, J. C. Ball, and R. E. Boutwell did then and there shoot off and discharge the contents of said gun at, in, and upon the body of said William T. Box, inflicting thereon a mortal wound, of which mortal wound the said William T. Box did languish, and languishing did then and there instantly die, and did then and there die within a year and a day after the infliction of the said mortal wound as aforesaid.

And the said Grand Jurors aforesaid, upon their oaths aforesaid, do say that upon the day aforesaid, at the place aforesaid, with said deadly weapon aforesaid, in the manner aforesaid, and used as aforesaid, the said M. F. Ball, J. C. Ball, and R. E. Boutwell, did unlawfully, feloniously, and with their malice aforethought, kill and murder the said William T. Box; the said M. F. Ball, J. C. Ball, and R. E. Boutwell, and each of them being then and there white persons, and not Indians nor citizens of the Indian Territory, contrary to the form of the statute in such cases made and provided, and against the peace and dignity of the United States of America." (Rec. 1).

case is and was for one and the same transaction and offense, i. e.. for the killing and murdering of William T. Box by these defendants, and that the defendants, M. F. Ball, J. C. Ball, and R. E. Boutwell, charged in this indictment No. 230 are the same identical J. C. Ball, M. F. Ball, and R. E. Boutwell charged and tried upon said indictment No. 3 in said Circuit Court of the United States, and not other and different persons. It was further agreed by all the parties hereto before the court and jury that no appeal was ever prosecuted from the judgment entered in said cause No. 3 as to the defendant, M. F. Ball. (Rec. 126.)

"William T. Box was killed on the night of June 26th, 1889." (Rec. 32.)

The verdict returned was, "We the jury find against the special plea of the defendant M. F. Ball as to the jurisdiction of the court, and we further find against the special plea of defendants, M. F. Ball, J. C. Ball, and R. E. Boutwell as to former trial: and we the jury find the defendants, M. F. Ball, J. C. Ball, and R. E. Boutwell, guilty of murder in the Indian country, as charged in this indictment.

D. R. BLAIR, Foreman."

May 5, '94. (Rec. 3.)

ARGUMENT.

Plaintiff in error M. F. Ball's plea of former acquittal should have prevailed in this case. The action of the Circuit Court in denying the plea on the motion of the Dis-

trict Attorney on account of the insufficiency of indictment No. 3, and in instructing the jury to find against the plea because this court has held that indictment was insufficient to charge murder, clearly shows that the reason for the rejection of this plea was the insufficiency, or supposed insufficiency of the indictment to sustain it. Since the decision of Vaux's case the doctrine that an acquittal on a defective or inadequate indictment is no bar to another prosecution has been very generally accepted on the authority of that case. Vaux's case, 4 Coke R. 44; People vs. Barrett 1 Johnson 66; Com. vs. Somerville 1 Virginia cases 164, 1 Wharton's Crim. Law, Sec. 551.

It is equally well settled that an acquittal or conviction of an assault will not bar an indictment for murder, where death results from the assault after the acquittal or conviction. Com. vs. Evans, 101 Mass. 25; Com. vs. Roby, 12 Pick. 496; Burns vs. People, 1 Parker C. R., 182; 1 Wharton's Crim. Law, Sec. 567A.

The transactions being the same in both indictments, death having ensued before the presentment of indictment No. 3, some grade of assault being well charged in indictment No. 3 which is included in the offense charged in this case, the verdict of acquittal and order of discharge of M. F. Ball having been in no way vacated or set aside, is a bar to any further prosecution, and the Government is estopped by the same.

First. Indictment No. 3 charges sufficiently the offense of assault with a deadly weapon with intent to kill, denounced in Sec. 2142 R. S.

The offense defined in Sec. 2142 is an attempt at murder at common law (2 Bishop Crim. Law, Sec. 57.) Where a murder is committed by means of a battery an assault is included in the murder (2 Bish. C. L., sec. 56), and an assault with intent to kill must necessarily be included.

In Ball vs. U. S. 140, U. S. 136, this court says of indictment No. 3, an assault is well charged. The indictment alleges the offense to have been committed "in Pickens County, in the Chickasaw Nation, in the Indian Territory," that "M. F. Ball and J. C. Ball and R. E. Boutwell, and each of them being there white men," that the assault was made "with a deadly weapon, to-wit, a certain gun." The allegation, "did unlawfully, fraudulently, feloniously and with their malice aforethought, and with a certain deadly weapon, to-wit, a certain gun, in the hands of the said M. F. Ball, J. C. Ball and R. E. Boutwell, then and there held, make an assault in and upon the body of one William T. Box with said gun held as aforesaid, said gun being then and there loaded and charged with gunpowder and leaden balls, then and there held and used as aforesaid, the said M. F. Ball, J. C. Ball, and R. E. Boutwell did shoot off and discharge the contents of said gun in and upon the body of said William T. Box, inflicting thereon ten mortal wounds, of which mortal wounds the said William T. Box did languish and languishing did die," is sufficient to charge an intent to kill (Whart. Crim. Ev. Sec. 142). The words "malice aforethought" refer to the intent; from the use of a deadly weapon in a manner likely to produce death, the law presumes the intent; and from

the infliction of mortal wounds with a deadly weapon the law presumes the intent was to kill.

"Every indictment ought, in some way, to show the evil intent, since this is an element without which crime is impossible, but some offenses are of such a sort that, *prima facie*, the evil intent appears on a mere statement of the act itself. (1 Bish. Crim. Prac., Sec. 525.) A killing with malice aforethought is an intentional killing, (People vs. Johnson, 1 Parker 291,) and to charge an assault and killing with malice aforethought is to charge the ingredients of assault with intent to kill.

By reason of the provisions of Sec. 1035 R. S. an assault with intent to kill is included in every indictment for murder and that offense is included in indictment No. 3. It is true that this court has held that indictment No. 3 was insufficient to charge murder, because the place of death is not alleged, but this is immaterial in the offense of assault with intent to kill. The offense of assault with intent to kill was complete when the wounds were inflicted. In Linton's case, (2 Virginia cases 205,) it is held that when the stabbing was done in Virginia and the death ensued out of the State, that the Virginia courts could try for the stabbing.

If one in the Indian Territory with a deadly weapon and of malice aforethought should inflict upon another mortal wounds, and the person so wounded should die of these wounds beyond the limits of the United States, the person inflicting such wounds would certainly be guilty of

an offense cognizable in the Circuit Court having jurisdiction over that country; it would not be murder, on account of the place where death ensued, but must be an assault with intent to kill. Now indictment No. 3 does not sufficiently charge murder, but it does charge well whatever offense it is, to inflict mortal wounds with malice aforethought on one, who dies beyond the limits of this country —assault with intent to kill, attempt at murder. Hence the rule, that an acquittal on an insufficient indictment will not bar another prosecution, has no application in this case.

Second. An acquittal on a valid indictment for assault with intent to kill, presented after death ensues from the assault, is a bar to a prosecution for murder.

The doctrine of Merger does not obtain in this court, (2 Wharton's C. L., Sec 2294; 1 Wharton's C. L., Sec. 564; R. S., Sec. 1035.

A former conviction or acquittal of a minor offense is a bar to a prosecution for the same act charged as a higher crime, whenever the defendant on trial of the latter might be legally convicted of the former had there been no other prosecution. (King vs. Vandercomb & Abbott, 2 Leach C. C. 708; 2 Bennett & Heard's Crim. Cases, 558 Note; People vs. Ny Sam Chung, 94 Cal. 304; 1 Herman Estoppel, see 416; State vs. Cooper, 1 Greene (N. J.) 361; State vs. Lewis, 2 Hawks. 98; State vs. Shepherd, 7 Conn. 54; State vs. Cross, 101 N. C., 770.) In the dissenting opinion of Justice Gray in Sparf vs. U. S. 156, U. S. 63,

it seems to be recognized that a conviction for assault may be had on a trial for murder.

At common law the rule was that when an indictment charged an offense which included within it a less offense, or one of lower degree, the defendant though acquitted of the higher offense might be convicted of the lesser, subject to the qualification that on an indictment for felony, the defendant could not be convicted of a misdemeanor. The reason of this qualification in England was that certain privileges were accorded to one charged with misdemeanor not accorded to one charged with felony. (1 Bish. Crim. Law, sec. 400. The reason ceasing to exist in this country the qualification was disregarded in New York, People vs. White, 22 Wend. 175; in Vermont, State vs. Scott, 24 Ver. 129; in New Jersey, State vs. Johnson, 1 Vroom 185, and in other States.

This qualification on the common law rule is in effect abolished by Sec. 1035 R. S.

The offense of assault with intent to kill is a felony. (Sec. 2142 R. S.) The fact that the offense is called by a different name in the second indictment is immaterial provided it is the same criminal act. (Moore vs. State, 71 Ala. 307; Holt vs. State, 38 Ga., 187; State vs. Layton, 25 Iowa 193; Hirshfield vs. State, 11 Tex. App. 207.

Mr. Wharton lays down the test to be "where the evidence necessary to support the second indictment would have been sufficient to procure a legal conviction upon the

first, the plea is generally good." (1 Wharton Crim. Law, sec. 564 and 566; People vs. Ny Sam Chung, 94 Cal. 304.

Tested by this rule an acquittal of an assault with intent to kill will bar an indictment for murder.

Another principle, while not universally, is very generally recognized, that the prosecutor may carve out as large an offense as he can, but he can carve only one, is applicable to the facts of this case. (Thomas vs. State, 40 Tex. 36; 1 Bish. Crim. Law, Sec. 1060; Drake vs. State, 60 Ala. 42; Wright vs. State, 9 Tex. App. 349; State vs. Smith, 43 Vt. 324; Roberts vs. State, 58 Am. Dec., 536 note. When a greater offense includes a lesser one, being placed in jeopardy under an indictment for the included offense only, constitutes a bar to a prosecution for the greater offense. (Roberts vs. State, 14 Ga. 8; Hickey, 23 Ind. 21; State vs. Murray, 55 Iowa 530; Com. vs. Squire, 1 Metc. (Mass.) 258; Com. vs. Bosworth, 113 Mass. 200; State vs. Snyder, 50 N. H. 150; State vs. Buzzell, 58 N. H. 257; People vs. Smith, 57 Barb., (N. Y.) 46; State vs. Lewis, 2 Hawk. (N. C.) 98; State vs. Miles, 26 Minn. 381.

A conviction for petit larceny is a bar to a subsequent prosecution for grand larceny on the same facts. (Southworth vs. State, 42 Ark. 270; State vs. Murray, 55 Iowa 530.) A verdict of acquittal is itself a bar though there be no judgment upon it. (11 Am. and Eng. Encyc. of Law 956; 1 Whart. Crim. Law, Sec. 540 and 587; People vs. Smalling, 94 Cal. 112.)

"If the offense of murder had been completed by the death of the injured party at the time of indictment found, then the assault would be included in the murder, and the state could carve but one offense out of the transaction, and if, in such case, the indictment be for an assault, a conviction or an acquittal there under would be a bar to a prosecution for any grade of homicide. Curtis vs. State, 22 Tex. App., 237.

"Some apparent authority, therefore, English and American, that a jeopardy for the less will not bar an indictment for the greater, must be deemed unsound in principle. (1 Bish. Crim. Law, Sec. 1057, and authorities cited.)

Third. Another reason no less impeachable why M. F. Ball's plea of former acquittal should prevail in this case is, that he was in fact acquitted on the merits and not upon a technical defect in the indictment.

Two of the leading cases usually cited in support of the doctrine that an acquittal on an insufficient indictment will not bar another prosecution. Vaux's case and People vs. Barrett supra, do not support many of the decisions made on their authority. In Vaux's case the first acquittal was on account of the defect in the indictment; while in Barrett's case this is not true, still that case was decided by a divided court, the dissenting opinions are strong, and in neither of these, and in few, if any, of the cases in which this question has been passed upon, has the acquittal been upon the merits. In 2 Hale's Pleas of the Crown 248, in

cases of this kind, we find the doctrine "that it shall be presumed that the judgment of acquittal was given upon the defect in the indictment, and not upon the verdict," and many cases holding that an acquittal on a defective indictment is no bar rest on this principle; but certainly no such presumption arises in a case like this where three men were jointly charged and each charged in the same allegations with an offense, and two were convicted and one acquitted. It occurs to us that there is at least room for a distinction between those cases, where an acquittal is had by reason of a defect in an indictment, and those cases where the defect is an accidental concomitant of the acquittal. M. F. Ball was acquitted of murder upon the merits. At his trial it was in the mind of no one that he was simply charged with an assault. Further, M. F. Ball was *non coram judice* in the interpretation of indictment No. 3 by this court.

The authorities that support the doctrine, that an acquittal on the merits on a defective indictment, is a bar to further prosecution are somewhat meager. Note under R. vs. Vandercomb, 2 Bennett & Heard's Crim. Cases, 555 and authorities cited. Note under Roberts vs. State, 58 Am. Dec. 538; Hurt vs. State, 25 Miss. 378; Wood vs. Southwick, 97 Mass. 356; Com. vs. Keith, 8 Metc. 532; Com. vs. Loud, 3 Metc. 328; Croft vs. People 15, Hun. (N. Y.) 484; Burns vs. People, 1 Park (N. Y.) 182; State vs. Spear, 6 Mo. 644.

A trial on the merits irrespective of defects in indict-

ments is made a bar to another prosecution in some of the States by statute. In Miss. How. & Hutch., 690, sec. 5.

Fourth. A further observation in this regard is, that the prosecution is estopped by the verdict of acquittal of M. F. Ball. (1 Whar. Crim. Law, sec. 751A; 1 Bish. Crim. Law, sec. 1021.)

The principle involved in the plea of former acquittal is one of the strong bulwarks of liberty, it is embedded in the very foundations of our criminal jurisprudence, and, being a remedial provision of the organic law, is liberally construed. (11 Amer. and Eng. Encyc. of Law 927.)

In this case innocence had been established on the merits, by the verdict of a jury, the defect in the indictment was unknown in the trial court, and we submit that M. F. Ball's plea of former acquittal should have prevailed.

The fourth and seventeenth assignments of error presenting the same question, will be considered together.

Assignment of Error:

IV.

"The court erred in sustaining the motion made by the district attorney to strike out the special plea of former jeopardy and former conviction of the defendants J. C. Ball and R. E. Boutwell, filed herein on the 25th day of April, A. D. 1894, which said special plea and motion are made parts of the record in this case, here referred to and made a part hereof, because said special plea of said

defendants showed that the matters charged in indictment No. 3, presented in the Circuit Court of the United States, Eastern District of Texas, and the matters charged in the indictment in this case, are for one and the same transaction and offense, to -wit: for the shooting, assaulting, kill ing and murdering Wm. T. Box; that at the time said indictment No. 3 was presented against said defendants in said court the government's prosecuting officer and the grand jury that returned the same knew that Wm. T. Box was dead; that the government, through its duly constituted grand jury and prosecuting officer did, by the finding and presenting of said indictmet No. 3 in said Circuit Court, in and for the Eastern District of Texas, (which said indictment No. 3 is a part of the record in this case, here referred to, and made a part hereof) carve out of the shooting, assaulting, killing and murdering of said Wm. T. Box a lesser offense than that of murder—that is to say, the government, through its said grand jury and prosecuting officer, carved out of said shooting, assaulting, killing, and murdering of Wm. T. Box, by the presentation of said indictment No. 3 in said court, the offense of an assault to kill and murder the said Box, and upon said indictment No. 3 the defendants J. C. Ball and R. E. Boutwell were placed upon trial in said Circuit Court, before a jury duly selected, empaneled and sworn, and a verdict of guilty of said offense returned against them by said jury, upon which a judgment of said court was pronounced and entered against them, adjudging

them, the said J. C. Ball and R. E. Boutwell, guilty of said offense, and said defendants thereby placed once in jeopardy and the government thereby barred from prosecuting them for the crime of murder." (Rec. 140).

Assignment of Error:

XVII.

The court erred in refusing to give to the jury the special charge No. 4, asked by the defendants J. C. Ball and R. E. Boutwell, which said special charge is as follows:

"4th. If you believe from the testimony in this case that the defendants J. C. Ball and R. E. Boutwell are the same identical J. C. Ball R. E. Boutwell charged in indictment No. 3, introduced in evidence herein, and if you further believe that said indictment No. 3 charged the said J. C. Ball and R. E. Boutwell with the same transaction and offense as the indictment herein charges them with, i.e., the shooting, wounding, assaulting, and murdering of Wm. T. Box, in the Chickasaw Nation, Indian Territory, and if you further believe from the testimony that at the time said indictment No. 3 was returned against said defendants the grand jury that returned the same and the government's officer who drew said indictment No. 3 knew that Wm. T. Box was dead at the time they so drew said indictment, and that he died from the infliction of the gunshot wound charged to have been inflicted by these

defendants, and if you further believe that said defendants were arraigned, tried, and convicted upon said indictment No. 3 by a jury duly selected, empaneled and sworn, then I charge you that the defendants J. C. Ball and R. E. Boutwell were each charged in said indictment No. 3 with an assault to kill and murder the said Wm. T. Box, and that the government of the United States, through its officers aforesaid, by presenting in this court said indictment No. 3, carved out of the shooting and wounding, killing and murdering of Wm. T. Box a lesser offense than murder, to-wit: assault to commit murder, and by the empaneling and swearing the jury to try said defenddants upon said indictment and in requiring said defendants to plead thereto, the government has waived its rights to prosecute said defendants for the crime of murder, and is now estopped from claiming a conviction in this case for any offense higher than an assault to murder, and you will therefore find the special plea of said defendants, pleading former jeopardy and former conviction, to be true." (Rec. 134).

And the court erred in his general charge to the jury, wherein he charged them as follows: "The defendants J. C. Ball and R. E. Boutwell have filed a plea that they were tried in this court under an indictment that was good for an assault with intent to kill and were found guilty of this offense, and consequently the court no longer has jurisdiction to try them for murder, because they say they have been convicted of a lower degree and therefore can-

not be again convicted for murder. You will find against that plea for the reason the Supreme Court held the indictment bad for murder and do not say that it charged an assault to murder, and you are instructed to find against that plea." (Rec. 129).

Because it was admitted upon the trial of this cause that the offense charged in indictment No. 3, returned into the Circuit Court of the United States, in and for the Eastern District of Texas, on tne 17th day of October, A. D. 1889, by a grand jury duly empaneled in said court, which said indictment is made a part of the record in this cause, and here referred to and made a part hereof, and indictment No. 230, returned into said court on the 7th day of May, A. D. 1891, and upon which these defendants have been tried and convicted in this case, is for one and the same transaction and offense, that is to say, for the killing and murdering of Wm. T. Box by the defendants herein; that the M. F. Ball, J. C. Ball and R. E. Boutwell named in the indictment No. 3 are the same M. F. Ball, J. C. Ball and R. E. Boutwell named in the indictment No. 230, and are not other and different persons, and the uncontroverted evidence in this case, which was admitted without any objection being made thereto, shows that the defendants J. C. Ball and R. E. Boutwell were tried upon said indictment No. 3, in the Circuit Court of the United States, in and for the Eastern District of Texas, at Paris, Texas, and convicted of the offense therein charged, prior to the time the indictment No. 230 herein

was returned into said court; that the government's officer who drew said indictment No. 3 knew at the time he drew the same, and the grand jury was aware at the time they returned the same into this court that the said Wm. T. Box was dead at that time, and that he died from the infliction of the gunshot wounds charged to have been inflicted upon him by these defendants; that said indictment No. 3 charged these defendants with an assault to kill the said Wm. T. Box, and the government, by the presenting of said indictment No. 3, carved out of the offense of shooting, wounding, assaulting, killing and murdering of said Box the lesser offense of assault to kill and murder, and was thereby estopped from presenting against these defendants indictment No. 230 herein, charging them with the higher crime, to-wit: murder. (Rec. 147).

Statement:

J. C. Ball's and R. E. Boutwell's sworn plea of *autre fois convict* was as follows: "And now come the defendants J. C. Ball and R. E. Boutwell herein, and for special plea herein the say:

First. That on the 17th day of October, 1889, the grand jury for the United States of America, empaneled in the Circuit Court for the Eastern District of Texas, holding sessions at Paris, Texas, returned and presented in said court a bill of indictment, numbered 3, against these defendants and M. F. Ball, charging them jointly with the same overt acts that are charged in the indict-

ment numbered 230 that defendants are now called to answer; a certified copy of said indictment No. 3 is hereto attached, marked "Exhibit A," for identification and made a part hereof; that the facts and acts charged in said indictment No. 5 are the same identical acts and transactions charged in the indictment No. 230 herein.

Second. On the 30th day of October, A. D. 1889, these defendants and their co-defendant, M. F. Ball, was arraigned and placed on trial in said Circuit Court of the Eastern District of Texas, upon all the charges and offenses charged in said indictment No. 3, as will appear from a certified copy from the record of said court hereto attached, marked "Exhibit B," for identification and made a part hereof.

Third. On the 3d day of November, A. D. 1889, the jury empaneled in said court in said cause returned into court a verdict, in words and figures as follows, viz: 'We, the jury, find the defendants J. C. Ball and R. E. Boutwell guilty as charged in the indictment, and we find M. Filmore Ball not guilty. Nov. 3d, 1889. A. P. Ball, foreman.'

Fourth. Said verdict was received in said cause without any objection from either of the defendants and by the court ordered filed and the jury discharged. Upon the return of said verdict the court then and there entered its judgment in words and figures as follows, to-wit: 'It is therefore considered by the court that the defendants, J. C. Ball and R. E. Boutwell, are guilty as charged in the

indictment herein and as found by the jury, and it is ordered that they be remanded to the custody of the marshal and be by him committed to the county jail of Lamar county to await the judgment and sentence of the court. It is further ordered that the defendant M. F. Ball be discharged and go hence without day.' All of which is apparent from the record in said cause, certified copies of which are hereto attached, marked "Exhibit C," and made a part hereof.

Fifth. Defendants allege that they were by virtue of said verdict and judgment or order remanding said defendants to jail to await the judgment and sentence of the court, held in Lamar county jail until the present indictment No. 230 was presented and filed against these defendants and their co-defendant M. F. Ball, after which time said cause number 3 was dismissed without the knowledge or consent of these defendants, and they were then required to give bond to answer the charge in said indictment No. 230.

Sixth. Defendants show to the court that said indictment No. 3, aforesaid, charged these defendants and their co-defendant with unlawfully, and with malice aforethought, shooting and wounding William T. Box; that said indictment was a good and sufficient indictment, fully charging them and each of them with the offense of assault with intent to kill; that the shooting and wounding William T. Box, charged in said indictment No. 3, is the same identical shooting and wounding of William T. Box

as charged in indictment No. 230, that they are now called upon to answer, and is one and the same shooting, and one and the same time, place and transaction; that if said William T. Box ever died from gunshot wounds as charged in said indictment No. 230, that he died before the said indictment No. 3 aforesaid, was presented, which fact was known to the district attorney who drew the bill of indictment and to the grand jury that presented same before the same was presented; that the facts proven upon the trial of these defendants upon indictment No. 3 showed that Box was dead at the time they were tried on said indictment, charging them with an assault with intent to kill William T. Box, by reason of which presentation of said indictment No. 3 and the empaneling and swearing the jury and arraigning these defendants for trial aforesaid, defendants say they were put in jeopardy for the same offense which they are now called to answer; that since the death of the said William T. Box, the government, by its legally constituted grand jury and Circuit Court aforesaid, and without the consent of either of these defendants, carved out of the shooting and wounding of William T. Box the offense of an assault with intent to kill, and tried and convicted these defendants, from which said conviction for an assault with intent to kill these defendants have never appealed; that if the court trying these defendants failed to render judgment upon the verdict of the jury finding these defendats guilty of an assault with intent to kill as charged in indictment No.

3, it is no fault of these defendants; that they nor either of them has ever objected to a legal judgment being rendered upon said verdict finding defendants guilty as charged in said indictment No. 3.

All the objections the defendants ever made to the judgment of the court trying them was to the judgment sentencing them to death, which said judgment was not supported by the indictment and verdict of the jury; that there is no order or judgment of this court vacating and setting aside said verdict unless the same was vacated and rendered void by the action of this court in dismissing said case No. 3, aforesaid.

Wherefore these defendants plead specially said facts in bar of further prosecution for the alleged shooting and wounding William T. Box, and pray that they be discharged and go hence without day.

Before the undersigned authority personally appeared J. C. Ball and R. E. Boutwell, who, each on oath, for himself, says that he is the identical person named in the above and foregoing plea, and who is charged by indictment No. 230 with the murder of William T. Box; that the facts and allegations stated in said plea are true. (Rec. 6).

The order denying said plea is as follows:

This day came on to be heard the special plea of former jeopardy interposed herein by defendants J. C. Ball and R. E. Boutwell, and the argument of counsel thereon being heard and the court being fully advised, because it

is the opinion of the court that the law is against the defendant, the plea is overruled and denied; to which ruling of the court the defendants in open court excepted. (Rec. 11).

Indictment No. 3 was dismissed Nov. 21, 1891. (Rec. 126.)

For further statement, see statement under foregoing assignments.

Proposition:

A conviction of a minor offense included in a major offense is a bar to a prosecution for the major offense.

Argument:

Indictment No. 3 was good for assault with intent to kill, the Government carved that offense out of the transaction. J. C. Ball and R. E. Boutwell were convicted by a verdict on that indictment. Such conviction is a bar to a prosecution on another indictment based on same facts, and they could only be punished by judgment and sentence on that verdict for assault with intent to kill.

Having discussed the propositions that indictment No. 3 is a good charge of assault with intent to kill, and that the prosecution can carve but one offense out of a single transaction under assignment three supra, and after observing that the rules applying to autre fois acquit and autre fois convict are practically the same, we will now proceed to show, (1) that the verdict of conviction is valid:

(2) that it referred to whatever offense was well charged in indictment No. 3; (3) that the fact that a proper judgment was not entered does not effect the validity of the plea; (4) that the dismissal after verdict is equivalent to an acquittal.

The verdict finding J. C. Ball and R. E. Boutwell guilty as charged in indictment No. 3, although returned on Sunday, was a valid verdict. 1 Bish. Crim. Proc., Sec. 1001 and authorities cited.

The verdict referred to the offense well charged in the indictment, assault with intent to kill. 1 Chitty's Crim. Law, 449A. Fletcher vs. U. S. 9 Fed. Cases 274.

The fact that improper judgment was attempted to be entered does not affect the validity of the plea of former conviction. Shepherd vs. People, 25 N. Y. 406; Hartung vs. People, 28 N. Y. 40; Ratzky, 29 N. Y. 124; King vs. Bourne, 1 Bennett & Heard's Leading Crim. Cases, 376 and note; King vs. Ellis, 1 B. & H. Leading Crim. Cases, 372.

The dismissal of indictment No. 3 after verdict of conviction is equivalent to an acquittal.

Fletcher vs. U. S. 9 Fed. Cases 274; 1 Whar. Crim. Law, Sec. 544 and 513; State vs. Elden, 41 Me. 165.

Plaintiffs in error J. C. Ball and R. E. Boutwell suggest that they do not now and never have complained at indictment No. 3, nor the verdict rendered thereon, that on the former appeal they urged that said indictment was insufficient to support the sentence of death pronounced

against them on that verdict, but the sentence of death was the order appealed from and the one they asked to have reversed. We submit that the plea of former conviction was admissible.

Assignment of Error:

II.

The court erred in refusing to first try the special plea of this defendant M. F. Ball to the jurisdiction of the court before these defendants were required to announce ready upon the merits of the case (which said special plea is made a part of the record herein, here referred to and made a part hereof,) because by submitting said special plea to the jury, together with the other issues in the case, there was created before said jury a multiplicity of issues, was liable to mislead and confuse them, and, by hearing all of the facts, prejudice them against the said M. F. Ball, and thereby influence said jury in finding against his said special plea. (Rec. 140.)

Statement:

The sworn plea of M. F. Ball, filed April 30, 1894, was as follows:

"And now comes M. F. Ball, one of the defendants in the above-entitled and numbered cause, and says the Government ought not further prosecute this cause against this defendant, because he says that the crime charged against this defendant is not an offense against the laws of the United States, and that this court has no jurisdiction

to try him for said alleged offense, for the reason that the deceased, William T. Box, and this defendant were each citizens of the Chickasaw Nation and members of the tribe of Chickasaw Indians at the time the offense is alleged to have been committed. and the crime alleged in the indictment was committed, if at all, in the said Chickasaw Nation, Indian Territory.

"Wherofore this defendant says that this court has no jurisdiction to try this defendant for the crime charged against him herein; and he prays that he be discharged and go hence without day." (See Record 11.)

Plaintiff in error excepted to the refusal of the Court to try said plea before they were required to answer to the merits. (Record 30.)

ARGUMENT.

The plea to the jurisdiction was not excepted to; it was sufficient to raise the question and plaintiff in error M. F. Ball was entitled to have it heard and determined before he was required to plead to the general issue. 4 Blackstone Com. 338; 1 Chitty's Crim. Law 439; 4 Wentworth 70; 2 Hale 286.

Assignment of Error:

I.

The court erred in overruling these defendants' amended motion in arrest of judement, filed herein on the 6th day of June, A. D. 1894, and in not setting aside the

judgment entered against the defendants and in not quashing the indictment upon which these defendants were tried and convicted, because said indictment charged no crime under the laws of the United States, will not support the verdict of the jury finding them guilty of murder and the judgment of the court adjudging them each guilty of that offense, and because said indictment is fatally defective in this:

First. Said indictment fails to allege upon what part of the body of deceased the fatal wounds were inflicted and fails to give any description of said fatal wounds.

Second. Said indictment fails to allege that deceased, Wm. T. Box, died of the wounds charged to have been inflicted upon his body by these defendants.

Third. Said indictment fails to allege that the deceased, Wm. T. Box, was killed by these defendants, or either of them, at a place within the sole and exclusive jurisdiction of the United States.

Fourth. Said indictment fails to allege facts sufficient to show that the Circuit Court of the United States in and for the Eastern District of Texas, at Paris, Texas, had jurisdiction to try these defendants, or either of them, for the killing and murdering of deceased, Wm. T. Box, in that it does not aver that the deceased, Wm. T. Box, or either of these defendants were not, at the time said deceased was killed, members of any tribe of Indians in the Indian Territory, by marriage or adoption, but simply avers that these defendants were not citizens of the Indian

Territory.

Fifth. Said indictment fails to allege that the deceased, Wm. T. Box, died within the jurisdiction of the Circuit Court, in and for the Eastern District of Texas. (Rec. 139).

Statement:

The motion of plaintiffs in error was as follows:

Now comes the defendants, M. F. Ball, J. C. Ball and R. E. Boutwell, and leave of the court first had and obtained, file their amended motion in arrest of judgment in lieu of their motion filed herein on the 17th day of May, A. D. 1894, and each move the court to arrest the judgment heretofore entered against them, adjudging them guilty of murder, because the indictment in the case upon which these defendants were tried and convicted is insufficient in law and fatally defective in the following particulars, viz:

First. Said indictment fails to allege that Wm. T. Box died of the mortal wounds inflicted by these defendants in and upon his body.

Second. Said indictment fails to give a description of the mortal wounds inflicted in and upon the body of Wm. T. Box by these defendants, and fails to allege upon what portion of his body said mortal wound was inflicted.

Third. Said indictment fails to allege that the offense with which these defendants stand charged was committed at a place within the sole and exclusive jurisdiction of this court.

Fourth. Because there is no allegation in the indictment showing that this court has jurisdiction to try these defendants for the offense alleged, in that it does not aver that the deceased, Wm. T. Box, and each of these defendants were not members of any tribe of Indians in the Indian Territory, by marriage or adoption.

Fifth. Because there is no allegation in the indictment that Wm. T. Box died within the jurisdiction of the Eastern District of Texas.

Wherefore these defendants pray that the judgment heretofore entered against them be arrested, set aside, and held for naught, and that the indictment herein be quashed. (Rec. 16).

On June 15, 1894, said motion in arrest of judgment was overruled by the court in the following order:

"This day came on to be heard the defendant's motion in arrest of judgment herein, and the argument of counsel having been heard, because it is the opinion of the court that the law is against the defendants, the motion is overruled; to which ruling of the court, the defendants then and there in open court excepted." (Rec. 18).

See copy of indictment 230 under assignment three.

ARGUMENT.

The indictment in this case is insufficient, in that every element of murder is not clearly charged. (1 Chitty Crim. Law, 172).

First. The indictment fails to allege that Box died of the mortal wounds inflicted by plaintiffs in error.

The language, "of which mortal wounds the said William T. Box did languish and languishing did then and there die," is not sufficient. Box may have died from other causes than the mortal wound; it does allege that he languished of the mortal wound, but not that he died. We find no precedent wherein it is not distinctly averred that death was of the wound.

It must be alleged that the wound was mortal and that the party died of the mortal wound. (2 Hale, 137; 1 Russell on crimes, 560; People vs. Lloyd, 9 Cal., 54).

In all cases the death by the means stated must be positively alleged and cannot be taken by implication and therefore where the means of death is alleged to be by a stroke, the indictment should proceed to aver that the prisoner thereby gave to the deceased a mortal wound of which he died. 2 Bish. Crim. Proc. Sec. 514: 1 East P. C., 341; State vs. Williams 36 Texas, 352; 2 Bishop Crim. Proc., Sec. 527; West vs. State 48 Ind. 483; Hawk. P. C., Sec. 83, Chap. 23.

If the indictment may be true and still the accused may not be guilty of the offense as it is described in the law, the indictment is insufficient. Com. vs. Young, 15 Grat. 664; U. S., vs. Slenker, 32 Fed. Rep. 694.

In the present case the indictment may be true and plaintiffs in error not guilty of murder. Box may have been mortally wounded by a gunshot wound fired by plaintiffs

in error, he may have languished of the wound and died, but not of the mortal wound inflicted. United States vs. Carll. 105, U. S., 611; United States vs. Hess, 124 U. S. 483.

The rule says Mr. Clifford, Jr., in U. S., vs. Crook 17 Wallace, 174, is universal that every ingredient of which the offense is composed must be accurately and clearly stated in the indictment; or the indictment will be quashed on motion, or the judgment may be arrested or reversed on error. Edmondson vs. State 41 Texas, Rep. 496; The State vs. Blan. 69 Mo. 317, 332; People vs. Wallace 9 Cal., 30; People vs. Lloyd, 9 Cal. 54.

It is well settled that the defect being matter of substance and not of form only is not cured by verdict and advantage may be taken of the omission by motion in arrest of judgment. (105 U. S,, 611 and 124 U. S., 483 already cited.)

Criminal courts of law are not at liberty to make intendments and inferences to support indictments in the same manner as they may do to support civil actions. (U. S. vs. Davis, 5 Mason 356; United States vs. Slenker, 32 Fed. Rep. 691.

The want of specific material allegations is not aided by the concluding summary in the indictment. (Shaffer vs. State 35 N. W. Rep. 372; Fouts vs. Territory, 8 O. St. 93.)

Second. The indictment fails to allege the place of death. This is an essential allegation.(Ball vs. U. S., 140 U. S. 133, and authorites cited.) The indictment at com-

mon law should aver that the deceased died in the county in which the indictment is found, where the stroke is at one time or place and the death at another, if the day be especially alleged, it must be that on which the party died and not that which he was stricken for until he died it was no murder. (Wharton on homicide, 275.)

The charge that "of which mortal wound the said Wm. T. Box did lanugnish, and languishing did then and there instantly die, and did then and there die within a year and a day after the infliction of the said mortal wound as aforesaid." is not sufficient.

The indictment does not charge "that said Box did then and there languish, and languishing did then there instantly die." This language does not allege where Box languished, but it imports that he lived after the mortal wound was inflicted, and after languishing did then and there instantly die, i. e. at the place where he languished. The language used by the pleader, "did languish and languishing did then and there instantly die," clearly imports some lapse of time after the reception ot the mortal wound before death occurred, "then and there employed in the sentence and used after the words "did languish" and refer to the time of the languishing and not to the time of the infliction of the fatal wound. The import of the language, all taken together, is plain: 1st. Box was wounded on the 26th of June, 1889, in Pickens County, Indian Territory, 2d. Box

languished and after languishing some time, he then and there, i. e., where he languished, did instantly die, and the time of death was on some date not named, but within less than a year and a day after the wound was inflicted.

This construction of the language used in the indictment gives force to every word employed, any other construction must necessarilly destroy either the language "languish and languishing" or the words "did instantly die."

A charge that A on such a day, at etc., made an assalt upon B, and him with a knife, feloniously struck, killed and murdered, was held not to import sufficiently that that the stroke was at the same time and place as the assault for want of the words 'then and there."

1 Warton's Cr. Law, Sec. 272,

1 Bishop's Cr. Pro. 5408

The language used in the indictment, "did instantly die," is not sufficient.

1 Wharton's Cr. Law, Sec. 272.

1 Bishop's Cr. Pro., Sec. 409.

Lester vs. State, 9 Mo. 668.

VI.

Assignment of Error:

The court erred in overruling the written motion of the defendants J. C. Ball and R. E. Boutwell, filed herein before this case was called for trial, asking that they be awarded a separate trial from their co-defendant, M. F.

Ball, and in forcing them to be tried jointly with their said co-defendant M. F. Ball, because said motion which is made a part of the record in this cause and here referred to, stated facts sufficient to entitle them to a separate trial in this cause. (Rec. 141).

Statement:

The motion for severance was as follows:

Now come the defendants J. C. Ball and R. E. Boutwell, and pray the court to grant them a severance in this case that they may have a seperate trial from their co-defendant M. F. Ball, for the following reasons, viz:

1st. Because their said co-defendant has once been tried and acquitted of the identical offense with which he is now charged.

2d. Because the government relies on acts and declarations of M. F. Ball as evidence upon which a conviction will be asked, which acts and declarations were made after the death of William Box, the party alleged to have been murdered, which acts and declarations were not made to the knowledge of or in the presence or hearing of either of these defendants.

3d. Because the proof that will be offered by the prosecution will show that M. F. Ball was not present at the time Box was killed, and was doing no act that would onstitute him a principal in the alleged murder of Wilcliam Box.

4th. Because this court has no jurisdiction to try M.

F. Ball, as fully appears from his plea herein.

5th. Because M. F. Ball is a material witness for these defendants, and they have a right to his testimony free from the embarrassments of a defendant on trial.

Wherefore they pray that a severance be granted and that M. F. Ball be first tried. (Rec. 13).

The order refusing motion, was made May 1, 1894, was as follows:

"This day came on to be heard the motion of the defendants, J. C. Ball and R. E. Boutwell, for a severance herein, and the same having been considered, because it is the opinion of the court that the ends of the law and justice do not so demand, the motion is overruled and a severance denied." (Rec. 14).

ARGUMENT.

While it is well settled that one charged jointly with others in the commission of a crime cannot demand a severance as a matter of right, but that it is a matter that rests in the sound discretion of the court; (U. S. vs. Merchant, 12 Wharton, 480), still in refusing the motion, J. C. Ball and R. E. Boutwell were doubtless injured by the admission on the trial of testimony, which was admissible against M. F. Ball, but not against them. Further, the motion should have been granted in this case, because it would have lessened the great number of issues to be submitted to the jury, but being overruled, the following issues were submitted: The former acquittal of M. F.

Ball, M. F. Ball's plea to the jurisdiction, whether M. F. Ball was a principal or an accessory, the former conviction of J. C. Ball ond R. E. Boutwell, and the issue of guilt or innocence of each of these plaintiffs in error.

Assignment of Error:

VII.

The court erred in sustaining the objection of the district attorney and in preventing the defendants from proving by the government witness Joe Cross how much he and Ed. Burney, both of whom were material witnesses for the government in this case, had paid or promised to pay Mr. Ownby for his services in assisting the district attorney in his prosecution of this case, because the same was a legitimate inquiry upon the trial of this cause, in that it tended to show the interest and feeling of said witnesses against these defendants.

Statement:

Joe Cross having testified that he and Ed. Burney employed Mr. Ownby to assist in the prosecution of this case, counsel for defendants asked, "how much do you pay him?" To which counsel for the government objected. Counsel for plaintiffs in error then stated to the court that they desired said proof for the purpose of showing the interest of the witness in this prosecution, as well as to show the interest of Ed. Burney, another material witness for the government, but the court sustained the

objection so made by the government, and would not permit said question to be answered, to which defendants excepted. (Rec. 48).

Joe Cross and Ed. Burney were both important witnesses for the prosecution. (Rec. 31 and 109).

ARGUMENT.

It is always competent to show the bias or interest of a witness as a circumstance affecting his credibility. State vs. Elkins, 14 S. W. Rep., 116; 1 Greenleaf's Ev., Secs. 446 and 450; Wills vs. Russell, 10 Otto, 621.

Our contention is that in no way could the extent of interest and bias of Cross and Burney be better shown than by showing the amount of money they had paid to secure the conviction of plaintiffs in error.

Assignment of Error:

X

The court erred in admitting in evidence, over the objection of these defendants, a certified copy of a marriage license under the hand and seal of the clerk of Cooke county, Texas, showing that S. C. Mayfield married Lucy O. Box prior to the time she married the defendant herein M. F. Ball (which certified copy was made a part of the record herein and here referred to), because the government thereby proved the contents of a written instrument by substitutionary evidence without showing the loss or

destruction of the original, and because said marriage license, or a certified copy thereof, was not indorsed upon the back of the indictment against these defendants, and because they had no notice whatever that the government would offer said marriage license or a certified copy thereof, in evidence against them, and because said marriage license raised an issue in this case, to-wit: the validity of the marriage of M. F. Ball with Lucy O. Box, alias Lucy O. Mayfield, which these defendants, and especiplly the said M. F. Ball, was not prepared to meet, and did not know would be raised upon the trial of this cause.

(Rec. 142.)

Statement:

The copy of marriage license was as follows:

State of Texas, Cooke County:

To any judge of the county or district court, reg-
312 ularly licensed or ordained minister of the gospel, Jewish rabbi, or justice of the peace, in and for said county of Cooke, greeting:

You are hereby authorized to solemnize the rites of marriage between Mr. C. S. Mayfield and Miss L.O. Box, and make due return to the clerk of the county court of said county within sixty days thereafter, certifying your action under this liccense.

Witness my official signature and seal of office, at office in Gainesville, this 1st day of Sept.. A. D. 1881.

[SEAL.] E. F. BUNCH,
Clerk County Court Cooke Co.,
By HARRY JACKSON,
Deputy.

I, R. M. Hancock, hereby certify that on the 4th day of Sept., A. D. 1881, I united in marriage C. S. Mayfield and Miss L. O. Box, the parties above named.

Witness my hand this the 10 day of Sept., A.D. 1881.

R. M. HANCOCK, *M. G.*

(Further indorsed:) Returned and filed for record the 10 day of Sept., A. D. 1881, and recorded the 10 day of Sept., A. D. 1881. E. F. Bunch, Clerk.

(Further indorsed:) I, E. O. Perry, clerk of the county court of Cooke county, Texas, do hereby certify that the within and foregoing license is a true and correct copy of the marriage record of this (Cooke) county as the same appears in Book 2, page 557. Given under my hand and seal of office this April 30th, 1794. [Seal.] E. O. Perry, Clerk Cook Co., Tex., by Tom Perry, Deputy.

To the introduction of which each of the defendants at the time objected. First, because the Government was seeking to prove the contents of a written instrument by secondary evidence, without making any effort to produce the original and without accounting for the loss or destruction thereof; and second, because said marriage license was not indorsed upon the back of the indictment against these defendants, and neither of them had any notice whatever that the said marriage license would be introduced in evidence against them; and third, because the Government, by the introduction of said marriage license, raised a collateral issue in this case, and one which neither of these efendants had any notice would be raised in this case.

But the court, notwithstanding the fact that the Government made no attempt to account for the original marriage license, and notwithstanding that no notice had been given either of these defendants that said marriage license would be introduced in evidence against them or either of them, permitted the Government to introduce the same in evidence before the jury, to which judgment and ruling of the court each of the defendants at the time objected.

(Rec. 120.)

ARGUMENT.

The evidence offered was not the best evidence. The original marriage license or a person present at the ceremony would have been the best evidence. Secondary evidence is admissable only when a sufficient predicate is laid. No predicate was laid in this case.

Plaintiffs in error having no notice of the marriage license, either in the list of witnesses on the back of the indictment or otherwise, and having objected to its introduction at that time it should have been excluded. R. S., Sec. 1033; Logan vs. U. S. 144 U. S. 263; Hickory vs. U. S. 151 U. S. 303. The object of Sec. 1033, R. S., was evidently to enable a person charged with a capital crime to enquire after the character and surroundings of the witnesses that were to testify against him when he is tried for his life. No difference in principle could exits

between a document and a living witness. The wisdom of the statute is illustrated in this case, for after these plaintiffs in error were convicted, they discovered that the Mayfield mentioned in this marriage license was not competent to contract marriage, being already married. (See Rec. 25.)

Assignment of Error:

XI.

The court erred in admitting Mrs. L. O. Angling to testify, over the objections of these defendants, that "she thought she was legally married to one of these defendants, to-wit: M. F. Ball, but had learned since that she was not legally married to him, and that at the time she married the defendant M. F. Ball, her former husband, S. C. Mayfield, was living; that she had never been divorced from him, and that the defendant M. F. Ball knew that said Mayfield was living at the time she so married the said M. F. Ball," because the said defendant M. F. Ball, prior to the time said witness so testified, introduced in evidence in this case a marriage license, issued by the legal authorities of the Chickasaw Nation, Indian Territory, showing that he, the said M. F. Ball, had, prior to the time Wm. T. Box was killed, married the said witness, and said witness testified that she lived with said M. F. Ball from the time she so married him up to the time her father, William T. Box, was killed, and that she never had been divorced from him. (Rec. 143.)

Statement:

When Mrs. Angling was offered as a witness by the Government, defendants obtained permission and introduced the following marriage license: (Sup. Rec. 1.)

"Chickasaw Nation, County of Pickens:

"To any judge of the county or district court, ordained minister of the gospel in and for said county of Pickens, greeting: You are hereby authorized to solemnize the rights of matrimony between Mr. M. F. Ball and Mrs. L. O. Mayfield, and make due return to the judge of the county court within thirty days thereafter, certifying your action under this license. Witness my official signature and seal of office, Pickens county court-house, this the 31st day of August, A. D. 1886.

WILLIS DICKERSON.

Judge County Court, Pickens County.

I, Willis Dickerson, hereby certify that on the 31st day of August, A. D. 1886, I United in marriage Mr. M. F. Ball and Mrs. L. O. Mayfield, the parties above named. Witness my hand, this 31st day of August, 1886.

WILLIS DICKERSON,
County Judge.

Recorded on page 105, Marriage Record of Pickens county, C. N., June 31st, 1887.

A. H. LAW, Clerk P. Co., C. N."

(Rec. 120).

Defendants' counsel were then permitted to prove by Mrs. Angling, that she lived with M. F. Ball as his

wife from the date of said marriage license up until after the killing of her father, Wm. T. Box, and that they had never been divorced. Counsel for defendants then objected to the witness testifying, because she was the wife of one of the defendants, but their objections were overruled, and said witness was permitted to testify, that she married C. S. Mayfield in Texas in 1881; that she was never divorced from Mayfield; that she was a daughter of deceased; that Mayfield was still living, and that M. F. Ball knew Mayfield and witness when Mayfield and witness lived together as husband and wife, to the introduction of which evidence defendants excepted. (Sup. Rec. 1).

Deceased Box was a citizen of the Chickasaw Nation; his wife was an Indian woman; Filmore Ball's wife was her daughter. (Rec. 47).

M. F. Ball filed a plea to the jurisdiction of the court, (Rec. 11) which was submitted to the jury in the charge of the court. (Rec. 128).

ARGUMENT.

The wife cannot testify against the husband. 1 Greenleaf, 834. When *prima facie* proof is given of the fact that a woman is the wife of a party to a suit, she is incompetent to rebut this proof. Ross vs Niles, Abb. Adm. 411. When the fact of marriage is controverted the wife is incompetent. 2 Stark. Ev., 400; Grigg's Case, 7 Royne, 1; Campbell vs. Twemlow, 1 Price, 81.

An Indian cannot be convicted in the Circuit Court of the United States for killing an Indian. Smith vs. U. S. 151 U. S., 50. The testimony was to an important jnrisdictional fact and should not have been admi tted.

Assignment of Error:

XIII.

The court erred in refusing to require the Government's officials to deliver the gun introduced in evidence to these defendants, or some other competent person, for the purpose of testing said gun as to the manner in which it shot "low-mould" buckshot, because said gun was the property of J. C. Ball, one of the defendants herein, but had been in the exclusive possession of the Government's officials sinceshortly after the killing of Wm. T. Box, in 1889. Defendants made said request before they closed their case. It was an admitted fact that deceased, Wm. T. Box, was killed with a shotgun loaded with low-mould buckshot, held by some one at a distance of 8 or 10 feet away; that the shot penetrated his body from his shoulders to his hip; the government witness Blunt testified that the gun in court and the property of J. C. Ball, would "scatter" "low-mould" buckshot badly; defendant J. C. Ball testified that he never shot "low-mould" buckshot from the gun. The fact as to how said gun would shoot "low-mould" buckshot was a material enquiry in this case, and a practical and thorough test of said gun would have accurately settled the disputed question as to whether said

gun fired the shot that killed Wm. T. Box, as claimed by the Government, or whether it did not fire said shot, as contended by these defendants. (Rec. 143.)

Statement:

Joe Cross testified that the wounds on deceased were eight in the breast, one on each side, and three glanced the collar bone. (Rec. 32.)

Blunt testified that he had once owned J.C. Ball's gun, which was now in the possession of the officers of the court, that said gun would scatter buckshot badly, that a a distance of 15 or 20 feet you could hit nothing with it. (Rec. 95.)

Counsel for defendants asked that they have the privilege of testing the shooting qualities of the gun in the presence of a deputy marshal, the gun being the one exhibited in court, and taken from the possession of J. C. Ball, and being the gun that the Government claimed the killing was done with. It was further shown that said gun had been in the exclusive control of the officers of the court since 1889. (Sup. Rec. 2.)

ARGUMENT.

The court had the power to grant the request, and in granting it would have made that certain which was uncertain. The Patent Type Foundry Co. vs. Lloyd, 29 L. J. (Exch.) 207; Thompson's Trials, Sec. 864.

Assignment of Error:

XIV.

The court erred in admitting in evidence against these defendants, and especially against the defendants J. C. Ball and R. E. Boutwell, over the objections of these defendants, the testimony of Mrs. Rider, who testified in substance as follows: "After the killing on the morning of June 27th, 1889, M. F. Ball (Filmore) told me that they were going to arrest him, but that he did not care, as he could prove out of it; that there were two men who staid all night with him by whom he could prove where he was; that they could not prove anything against him, and that they never would dream of John Ball and Bob Boutwell doing such a thing; that they would take him and try him, but as they could not prove anything against him, they would turn him loose. He said he did not see what they were tracking around for; that they could make nothing out of tracks; that he was perfectly satisfied that the tracks would exactly fit J. C. Ball and R. E. Boutwell, but so far as his tracks were concerned, he was not afraid of it; he said he did not see why Joe Cross and Ed. Burney were dishing in so deep, for it was none of their business. He asked me how many shot they took out of old man Box's body. I told him, and then he said that he had shot the other load out of J. C. Ball's gun at some chickens and loaded the gun with fresh shot, and he wanted to know of me if I thought they would still think

J. C. Ball's gun killed deceased. He said they were going to lay it off on an old woman there. He then told me that if he could he would call the old man back this morning as free as he ever done anything in his life. I told him it was too late. He then asked me if I had noticed any one down there eyeing and watching him; I told him I did not, but I did see them. He asked me if he looked bad: I told him he did not; he said that he saw everybody there eyeing him all the time. He told me over a time or two about Burney and Cross tracking around there, and said if it had not been for them tracking around so much that they never would have been bothered." (See Rec. 96.)

And in admitting, over the objection of these defendants, the testimony of J. T. Hoover, who testified in substance as follows: "After the other trial and after M. F. Ball was acquitted, I had a conversation with him about this case. He asked me something about the boys, John Ball and Boutwell. He asked me if I knew anything about them and how they were getting along. I told him no, but that they were in pretty bad shape, I guessed. He said, 'I guess the boys will not hang;' I said, 'I hope not, if they are not guilty.' I told him he ought to do all he could for them, and he said he done about all he could do. I said something about the people thinking that they were all guilty of killing old man Box; he said the people could think and be damned; that so far as he was concerned, he could go up and admit that he killed deceased; that it did not make a damn bit of difference now, as he had come clear and they could not try him for it any

more,' because the same was declarations made by one of the defendants, M. F. Ball, after the homicide was committed, and was not made in the presence or hearing of the defendants J. C. Ball and R. E. Boutwell, or either of them, and the same was calculated to mislead the jury and prejudice them against J. C. Ball and R. E. Boutwell. (Rec. 144).

Defendants J. C. Ball and R. E. Boutwell objected to this evidence and their objection was overruled (Rec. 96), and were granted a general exception to all the rulings of the court (the court having certified the whole record. (Rec. 137.)

ARGUMENT.

Proposition:

After the conspiracy has come to an end, whether by success or failure, the admission of one conspirator, by way of narrative of past facts, are not admissible against the others.

1 Greenleaf Ev., Sec. 111, Logan vs. U. S. 144 U. S. 263.

3 Greenleaf Ev., Sec. 94.

Holden vs. State, 18 Tex. App. 106.

Having admitted this evidence the court should have charged the jury that they could only consider it against M. F. Ball.

Jones' Case 31 Gratt. (Va.) 836.
Collins vs. State 24 (Tex.) App. 141.
Rex vs. Hardy, 24 Howell's St. Tr. 451.

The testimony of these witnesses tended rather to exculpate M. F. Ball in so far as he was charged with being a principal rather than incriminate him, and could have had little effect on the jury in determining M. F. Ball's guilt; but as to J. C. Ball and R. E. Boutwell it was very damaging. Jones' Case, 31 Gratt. (Va.) 836, states the correct doctrine. The court in that case said: "But on a joint trial of two for conspiracy, the declarations of one made after the design was completed and abandoned are admissible, because they tend to connect him with the conspiracy, but the judge should instruct the jury that these declarations have no weight to prove the other guilty of conspiracy." The court failed to instruct the jury in keeping with the principle here announced, hence the admission of said declaration of M. F. Ball was error for which J. C. Ball and R. E. Boutwell ought to have a reversal of this case.

A further consideration is that J. C. Ball and R. E. Boutwell asked a severance among other things on account of this evidence.

Assignment of Error:

XVI.

The court erred in refusing to give to the jury the 3d special charge, asked by the defendant M. F. Ball, which is as follows:

"3d. If you believe from the testimony in this case that the deceased, Wm. T. Box, was a recognized citizen

of the Chickasaw Nation at the time he was killed, and that he had, prior to that time, married a Chickasaw Indian woman under the laws of that tribe of Indians; and if you further believe that he, the said W. T. Box, was residing in said Chickasaw Nation at the time he was so killed; and if you further believe from the testimony that the defendant M. F. Ball, prior to the time said Wm. T. Box was killed, had also married a Chickasaw Indian woman, and was recognized by the Chickasaw government as a member of their tribe by virtue of said marriage with said Indian woman; and if you further believe that he was so recognized at the time Wm. T. Box was killed, and that at that time he, the said M. F. Ball, was residing in the Chickasaw Nation, Indian Territory, then you are charged that this court would not have jurisdiction to try the said M. F. Ball for the offense charged in the indictment herein, and you will find his plea to the jurisdiction of the court to be true." (See Rec. 134.)

And the court erred in his general charge when he charged the jury as follows: "M. F. Ball has filed a plea to the jurisdiction of this court, which states in substance that he was married to the daughter of Wm. T. Box; that Box had married an Indian woman living in the Indian country, and as a result of such marriage was the daughter whom he had married, and that consequently, under the treaty between the Indians and the United States, this court was without jurisdiction to try him. The evidence

offered before you first is the marriage license issued in Cooke county, Texas, which authorizes the marriage of Miss Lucy Box, the lady that Filmore Ball afterward claims to have married, and one Mayfield. Mrs. Mayfield, or Mrs. Ball, testified that she had never been divorced from Mayfield; that she had lived with Mayfield from the time of marriage until a few months prior to her attempted marriage with the defendant, Filmore Ball. The defendant Filmore Ball introduces a marriage license, issued in the Chickasaw Nation, signed by the county judge and filed properly there, and that the evidence attending it shows that the marriage had been performed between him and Mrs. Mayfield. You are instructed that if you believe from the evidence that Wm. T. Box, the man that was killed, was a white man, living in the Chickasaw Nation, and that he married an Indian woman, and as the result of such marriage was the lady that married Mayfield, or Ball, or both, and you believe from the evidence that she was not married to Mayfield, or that if she had been married to him that she was divorced from him, or he was dead at the time of her marriage to Filmore Ball, in that event you are instructed that the court would not have jurisdiction to try Filmore Ball in this case. But if you believe from the testimony that she married Mayfield, and that she was not divorced from him at the time of her attempted marriage to Filmore Ball, or that Mayfield was not dead, or if he was living at the time of the attempted marriage to Filmore

Ball occurred and not divorced from Mayffeld, in that event the marriage with Filmore Ball would be a nullity, on account of her disability to contract the marriage relation, and the court would have jurisdiction, and you would find against his plea to the jurisdiction of the court on that ground. (See Rec. 128.)

Because the testimony in the case showed that the deceased, Wm. T. Box, and the defendant M. F. Ball were each members of the Chickasaw tribe of Indians, in the Indian Territory, at the time the homicide was committed, and that they each resided there at the time Wm. T. Box was killed, and because the court in his general charge to the jury submitted to them for their determination the validity of the marriage of Lucy O. Box to C. S. Mayfield, and the marriage of Lucy O. Box or Mayfield to the defendant M. F. Ball, without any proof having been made of the laws of the Chickasaw Nation governing marriages and divorces in said Chickasaw Nation." (Rec. 146).

ARGUMENT.

M. F. Ball and Wm. T. Box having married Chickasaw women and taken up their residences in the Chickasaw Nation, and having been recognized by the Chickasaw Nation as members of that tribe, were Indians, and this court would have no jurisdiction to try the one for the murder of the other. Art. 38 of the Treaty of the United

States and the Choctaw Nation; R. S. of 1873, p. 376; Ex Parte Mayfield, 141 U. S., 107; Ex Parte Reynolds, 5 Dillon, 394; U. S. vs. Osborne, 6 Sawyer, 406.

A marriage under and by virtue of the laws of the Chickasaw Nation, recognition as a citizen by virtue of said marriage, residence in that Nation with an Indian wife, are sufficient to support a plea to the jurisdiction, notwithstanding the fact that it is shown that at one time one of the parties to the marriage contract was not capacitated to make it. Every presumption is in favor of the validity of the marriage. 14 Am. and Eng. Ency of Law, 520, and authorities cited.

Assignment of Error:

XX.

These defendants have not been convicted by the due process of the law of the land in this: The jury that returned the verdict of guilty against the defendants in this case was not placed in charge of a duly sworn bailiff of this court after they were empaneled and charged with this case until they returned a verdict of guilty against these defendants, but, upon the contrary, said jury was in the exclusive control of Drumgoole Williams from the time they were empaneled until they returned their said verdict, without any oath whatever being administered to him, the said Drumgoole Williams, as such special bailiff, all of which will be made apparent by an inspection of the record in this cause, here referred to and made a part hereof. (Rec. 149).

Statement:

Plaintiffs in error asked for a new trial on this ground. (Rec. 22).

It was admitted upon the hearing of said motion, by the Government and each of the defendants, that Drumgoole Williams was in charge of the jury who tried these defendants from the time they were empaneled until they returned a verdict of guilty against these defendants; that the said Drumgoole Williams had no special oath administered to him as bailiff of said jury, and that the only oath ever administered to him was an oath as a deputy United States marshal for the Eastern District of Texas, many months before the trial of this cause commenced. It was further agreed and admitted upon the hearing of said motions for new trial that the court instructed the jury in this case that they must not separate, must not talk to each other, and must not allow themselves to be talked to by any party on the outside about this case. (Rec. 136).

ARGUMENT.

When the jury retire to deliberate on their verdict, they are put in care of an officer to whom an oath is administered. 1 Bishop Crim. Proc., Secs. 991 and 992; People vs. Hughes, 29 Cal., 257.

Assignment of Error:

XXIII.

The court erred in not granting the defendant M. F. Ball a new trial on account of the newly discovered evi-

dence of J. L. Keeler, the marriage license of C. S. Mayfield to Louisa Rodgers, and a certified copy of the record of the divorce proceedings of Louisa Mayfield vs. C. S. Mayfield, had in the district court of Cooke county, Texas, all of which fully appears in the record in this case, here referred to and made a part hereof; because said defendant M. F. Ball had no notice prior to the trial of this cause that the Government would introduce in evidence the marriage license of C. S. Mayfield and Lucy O. Box, the wife of said defendant, and in that way attempt to show that said defendant M. F. Ball was not legally married to Lucy O. Box, alias Mayfield, a Chickasaw Indian woman, and thereby establish the fact that this court had jurisdiction to try said M. F. Ball, and because said newly discovered evidence showed conclusively that M. F. Ball was lawfully married to said Lucy O. Box, alias Mayfield, and the deceased being a member of the Chickasaw tribe of Indians, this court did not have jurisdiction to try the said M. F. Ball for murdering said deceased. (Rec. 150.)

Statement:

In the 25th ground of M. F. Ball's motion for a new trial he asked a new trial on account of the newly discovered evidence mentioned in the assignment, affecting the jurisdiction of the circuit court. (Rec. 23.)

When said motion came on to be heard the following evidence was produced before the court, to-wit:

A certified copy of the marriage license issued by the clerk of Cooke county, Texas, showing that S. C. Mayfield

was married to Louisa Rogers before he married Miss L. O. Box, which said certified copy is hereinbefore set out in full. (Rec. 23.)

The affidavit of J. L. Kelier which was attached to M. F. Ball's amended motion for a new trial, to the effect, that he knew Cebe Mayfield, who married Wm. T. Box's daughter, that Cebe Mayfield had married Louisa Rogers before he married Miss Box, that he had a living wife at the time he married Miss Box, that he had never heard of Mayfield getting a divorce from his first wife, that he heard she was living in San Antonio, Texas. (Rec. 26.)

A certified copy of the record of the district court of Cooke county, Texas, showing that Louisa Mayfield instituted in said district court of Cook county, Texas, on the day of January, A. D. 1878, a suit for a divorce against S. C. Mayfield, and that said suit remained on the docket of said district court of said county up to the 12th day of February, A. D. 1883, when the said suit was dismissed for the want of prosecution. (Rec. 136.)

On the trial of the cause a marriage license showing that C. S. Mayfield married Miss L. O. Box on Sept. 4, 1881, was introduced. (Rec. 119.)

Mrs. Angling (alias Mayfield) testified that Mayfield was living and she had not been divorced from him when she married M. F. Ball. (Sup. Rec. 1.)

Plaintiff in error M. F. Ball, in support of his plea to the jurisdiction offered on the trial, a ceftificate of marriage showing that M. F. Ball married Mrs. L. O. May-

field August 31, 1886. (Rec. 12ⁿ.)

Wm. T. Box was a citizen of the Chickasaw Nation. (Rec. 47.)

ARGUMENT.

The alleged newly discovered evidence stands on much higher ground than being newly discovered evidence merely, it consisted of jurisdictional facts.

"This court has power to enquire with regard to the jurisdiction of the inferior court, either in respect to the subject matter, or to the person, even if such enquiry involved an examination of facts outside of, but not inconsistent with the record." Ex Parte Mayfield, 145 U. S. 107.

When the deceased and the person accused of the murder are both members of the tribe of Chickasaw Indians, the United States courts have no jurisdiction over the offense. Smith vs. U. S., 151 U. S., 50; Ex Parte Mayfield, *supra*.

The undisputed evidence offered by the government upon the trial showed that the deceased Box was a Chickasaw Indian citizen by adoption, he having married an Indian woman and lived in the Indian Territory for many years with her as his wife. Plaintiff in error, M. F. Ball, proved on the trial that he married a daughter of deceased Box. The government, without any notice to M. F. Ball, proved by certified copy of marriage license that Miss Lucy Box, now M. F. Ball's wife, was married to one

Mayfield before she married Ball, and that she had not been divorced at the time she married M. F. Ball. This proof, under the charge of the court forced the jury to find against M. F. Ball's plea to the jurisdiction. (See Rec. 129). After the conviction, plaintiff in error, M. F. Ball, discovered the real fact to be at the time Mayfield married Miss Lucy Box, he, Mayfield, had a living wife and a divorce suit then pending in Cooke county, Texas. This undisputed proof showed the marriage between Mayfield and Miss Box to be a nulity, and hence Mrs. Mayfield could marry M. F. Ball at the time she did, the marriage was valid and constituted Ball a citizen of the Chickasaw Nation, and the court had no jurisdiction to try M. F. Ball for the murder of Box, and should have granted a new trial as to M F. Ball and discharged him.

Assignment of Error:

XXV.

The court erred in overruling the seventeenth (17) ground in the motion for a new trial made by the defendant M. F. Ball, which is as follows, to-wit: "Because the verdict of the jury finding this defendant guilty of the murder of Wm. T. Box is contrary to the law as given in charge by the court, is contrary to the evidence adduced, and is without evidence to support it in this: the testimony conclusively shows that if this defendant is guilty of any offense, he is guilty as an accessory and not as a principal offender in the killing of Wm. T. Box." (Rec. 151).

Assignment of Error:

XXVI

The defendant M. F. Ball has not been tried by due process of the law of the land in this: He was indicted, tried, convicted and sentenced to death upon an indictment charging him, the said M. F. Ball, with being a principal offender in the killing and murdering of Wm. T. Box, when all of the evidence, which is made a part of the record in this case, here referred to and made a part hereof, shows conclusively that the said M. F. Ball was not present when the said Box was killed; that he, the said M. F. Ball, was doing no act at the time said Box was killed in furtherance of a common design of these defendants or any one else to kill deceased; but the testimony shows conclusively that the said M. F. Ball, at the very time the shot was fired that killed deceased, was at a house a half mile away playing a fiddle for parties at a dance, and said testimony shows that the said defendant M. F. Ball was not a principal offender in the killing of said Box, but if guilty of any offense he was guilty as an accessory to said killing. (Rec. 151).

Statement:

The undisputed evidence shows that M. F. Ball was at R. E. Boutwell's house playing the fiddle at the time of the homicide. (Rec. 59).

On the night of June 25, 1889, there was a dance at R. E. Boutwell's house; Wm. T. Box was there. (Rec.

58). Box left for home and after he left J. C. Ball and R. E. Boutwell left. (Rec. 63). The next morning Box was found dead and the wounds on his body indicated that he had been shot with a shotgun, loaded with buckshot. (Rec. 32). The evidence indicates that J. C. Ball and R. E. Boutwell shot Box. Boutwell's house was about 1000 yards from where Box was killed; (Rec. 35) that at the time the report of the gun was heard M. F. Ball was playing the fiddle for a set that was then dancing. (Rec. 88.) After this set was over M. F. Ball tried to get those who were preparing to leave for home to stay longer. (Rec. 89).

It was the intention of the Solicitor General and counsel for plaintiffs in error to have incorporated in the printed record all the evidence that tended to connect M. F. Ball with the murder of Box.

ARGUMENT.

M. F. Ball was charged and convicted as a principal to the murder of Box; the evidence shows him to be an accessory, if anything, and the conviction cannot stand. Hughes vs. State, 12 Ala., 458; 1 Bishop's Crim. Law, Secs. 653 and 663; Howly vs. State, 15 Ga., 346.

The contention of the prosecution is that J. C. Ball and R. E. Boutwell were the real actors in the killing, and that M. F. Ball was an abettor of the murder or a princi-

pal in the second degree, and that he was constructively present. The court submitted this theory to the jury. (Rec. 130).

"If the will of such other individual contributed to the act, the test, to determine whether the law deems him a principal rather than an accessory, is, whether he was so near, or otherwise so situated as to make his personal help, if required, to any degree available." 1 Bishop's Crim. Law, Sec. 653; see Chitty's Crim. Law, 256; Com. vs. Knapp, 9 Pick., 496.

Tested by this rule, the undisputed evidence makes M. F. Ball an accessory and not a principal. M. F. Ball was not actually present at the scene of the killing, and was not so situated as to render any personal aid to those engaged in the killing, and hence was not constructively present. Whatever complicity M. F. Ball may have had in the killing of Box, the proof wholly fails to show him to be a principal, and this conviction cannot stand.

If for any cause this case is reversed as to M. F. Ball, we contend that it ought to be reversed as to J. C. Ball and R. E. Boutwell also. If M. F. Ball's plea of *autre fois acquit* was good, J. C. Ball and R. E. Boutwell were entitled to the benefit of his testimony, free from the encumbrance of this charge. If this court had no jurisdiction to try M. F. Ball, then certainly to place him on trial with J. C. Ball and R. E. Boutwell, and admit in evidence his declarations made after the culmination of the conspiracy, which were damaging to J. C. Ball and R. E.

Boutwell in character, and which were in no way limited by the court in his charge to the jury, was detrimental to J. C. Ball and R. E. Boutwell, and constituted an injury to their substantial rights.

We submit that for the errors complained of, this case ought to be reversed.

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In the Supreme Court of the United States.

OCTOBER TERM, 1895.

M. F. BALL, JOHN C. BALL, AND R. E. Boutwell, plaintiffs in error,
v.
THE UNITED STATES.
} No. 461.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF TEXAS.

BRIEF FOR THE UNITED STATES.

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POINTS AND ARGUMENT.

For the convenience of the court the assignments of error will be treated in the order in which they are presented in the brief for plaintiffs in error.

FORMER JEOPARDY — ASSIGNMENTS III, IV, XV, AND XVII.

The third assignment is as follows:

The court erred in sustaining the motion made by the district attorney to strike out the special plea

of former jeopardy and former acquittal, of the defendant M. F. Ball, filed herein on the 25th day of April, A. D. 1894, which said special plea and motion to strike out the same are made parts of the record herein, here referred to and made a part hereof, because said special plea showed that the said defendant M. F. Ball had, before the indictment in this case had been presented in this court, been legally tried by a jury duly and legally empanneled in a court of competent jurisdiction, to wit, in the circuit court of the United States in and for the eastern district of Texas, at Paris, Texas, for the same offense charged against him in this cause, to wit, for the shooting, wounding, killing, and murdering of Wm. T. Box, and by said jury found not guilty of said offense, and by said court discharged by its judgment entered of record. (Rec., p. 140.)

The special plea of M. F. Ball was as follows:

And now comes M. F. Ball, one of the defendants in the above cause, and for special plea herein says:

First. That heretofore, on or about the 30th day of November, A. D. 1889, he was tried and acquitted at Paris, Texas, in a court of competent jurisdiction, to wit, in the circuit court of the United States for the eastern district of Texas, upon an indictment numbered 3 in said court, duly and legally presented therein, charging this defendant jointly with J. C. Ball and R. E. Boutwell, with the same identical offense that is charged in indictment No. 230 herein, and upon which he is now called to answer; that indictment No. 3 aforesaid charged this defendant and his codefendants with the same identical overt acts, i. e., shooting William T. Box, that they are now charged with in indictment No. 230 herein.

Second. That he was duly arraigned and pleaded not guilty to the charge in the said indictment No.

3; that thereupon he was tried before a jury of twelve men, duly and legally selected, empanneled, and sworn to try the issue so joined, in the United States circuit court for the eastern district of Texas, holding session at Paris, Texas, and being the court wherein said indictment was duly and legally presented by a grand jury duly organized by said court.

Third. That on the 3d day of November, A. D. 1889, the jury so selected, empaneled, and sworn, after hearing the evidence and the charge of the court, returned into court the following verdict, to wit: "We, the jury, find the defendants J. C. Ball and R. E. Boutwell guilty, as charged in this indictment, and we find M. Filmore Ball not guilty. A. P. Ball, foreman. Nov. 3rd, 1889." The court received and filed said verdict, and then and there rendered its judgment, as follows: "It is therefore ordered by the court that the defendants J. C. Ball and R. E. Boutwell are guilty as charged in the indictment herein and as found by the jury, and it is ordered that they be remanded to the custody of the marshal, and be by him committed to the county jail of Lamar County to await the judgment and sentence of the court. It is further ordered that the defendant M. F. Ball be discharged and go hence without day." All of which proceedings appear upon the record of said United States circuit court in and for the said eastern district of Texas, holding sessions at Paris, Texas, certified copies of said entries are hereto attached, marked "Exhibit A," and made a part hereof, which said judgment was never vacated, annulled, or set aside in any way.

Fourth. Defendant shows to the court that said indictment No. 3 aforesaid was a good and valid indictment, and charged this defendant with the

commission of a felony, and in so charging charged this defendant with the same overt acts, to wit, the shooting of William T. Box, that are charged in the indictment No. 230, to which affiant now pleads.

Wherefore affiant pleads former jeopardy and former acquittal upon the same identical offense charged in the indictment in this cause.

Fifth. Defendant says that if he is mistaken as to the bill of indictment No. 3 as aforesaid, charging him and his codefendants with the same offense charged in indictment No. 230, and the court should hold that indictment No. 3 only charged this defendant and his codefendants with assault with intent to kill William T. Box, then this defendant for special plea in this behalf shows to the court that the shooting and wounding William T. Box, charged in said indictment No. 3, is the same identical shooting that is charged in indictment No. 230, and is one and the same transaction; and that the said William T. Box died before the filing of the indictment No. 3 against the defendant and his codefendants, and which fact was known to the dist. atty. who drew the bill of indictment, and to the grand jury that presented said indictment No. 3, and that by the terms of said indictment this defendant was charged with assault with the intent to kill said William T. Box, and was tried in said court and acquitted of said offense of assault to kill, and all other offenses charged in said indictment. This defendant therefore charges that the United States, by its legally constituted grand jury, district attorney, and circuit court, as aforesaid, in the manner aforesaid, and without the consent of this defendant, carved out of the shooting of William T. Box the offense of an assault to kill, and tried this defendant, of which said offense he was duly and legally acquitted.

Wherefore he pleads said acquittal in bar of any further prosecution for the alleged shooting of William T. Box, as charged in said two indictments. (Rec., pp. 3, 4, 5.)

The fifteenth assignment is as follows:

Because the court erred in failing and refusing to give to the jury the special charges, No. 1 and 2, asked by the defendant M. F. Ball, and which said special charges are as follows:

1. If you believe from the evidence in this case that the defendant M. F. Ball is the same M. F. Ball named in indictment No. 3, introduced in evidence herein, and that a jury duly selected, empannelled, and sworn to try him upon said indictment returned a verdict of not guilty against said M. F. Ball, and if you further believe from the testimony in this case that the said M. F. Ball was charged in said indictment No. 3 with the same transaction and offense as charged in the indictment in this case, i. e., if you believe that he, the said M. F. Ball, was charged in said indictment No. 3 with the shooting, wounding, killing, and murdering of Wm. T. Box in Pickens County, Chickasaw Nation, Indian Territory, and if you further believe that Wm. T. Box was dead at the time said indictment No. 3 was returned against said M. F. Ball, and that that fact was known to the Government's prosecuting officer who drew said bill of indictment No. 3 at the time he so drew the same, then you are charged that the said M. F. Ball has been once placed in jeopardy for the shooting, wounding, assaulting, killing, and murdering of Wm. T. Box, and you will find the defendant's, M. F. Ball's, plea of former acquittal to be true and find him not guilty upon the indictment herein.

"2nd. You are instructed that under the evidence and admissions in this case the defendant M. F. Ball has been heretofore tried and acquitted of the killing and murdering of Wm. T. Box and by a valid judgment of this court discharged of said offense, which said judgment has been in no way set aside, annulled, or otherwise vacated or appealed from; you will therefore find the said M. F. Ball's plea of former acquittal and former jeopardy to be true and acquit him herein."

And the court erred in his general charge, wherein he charged the jury in this case as follows, to wit:

"The defendant Filmore Ball has further pleaded that he has been tried heretofore in this court on an indictment charging him with the murder of Box, and was acquitted. The facts are admitted that he was so tried, and he pleads former acquittal in bar of this prosecution. Upon that plea you are instructed that the Supreme Court of the United States has decided that the indictment was defective in so far as it attempted to charge the offense of murder, and the defendant's plea of former acquittal would not be good, and you would find against him. In other words, parties indicted upon a defective indictment could not plead a former conviction or acquittal, and you are instructed to find against that plea."

Because it was admitted upon the trial of this cause that the offense charged in indictment No. 3, returned into the circuit court of the United States in and for the eastern district of Texas, at Paris, Texas, on the 17th day of October, A. D. 1889, by a grand jury duly empannelled in said court, which said indictment is made a part of the record, in this cause and here referred to, and indictment No. 230, returned into said court on the 7th day of May, A. D. 1891, and upon which these defendants have been tried and convicted in this case, is for one and

the same transaction and offense—that is to say, for the killing and murdering of Wm. T. Box by the defendants herein, M. F. Ball, J. C. Ball, and R. E. Boutwell, and that the said M. F. Ball, J. C. Ball, and R. E. Boutwell, named in said indictment No. 3, are the same M. F. Ball, J. C. Ball, and R. E. Boutwell named in indictment herein, No. 230, and not other and different parties; and the uncontroverted evidence in the case, which was admitted without objection from the Government, showed conclusively that the defendant M. F. Ball was tried in this court upon said indictment No. 3 and acquitted of said offense prior to the time indictment No. 230 herein was returned against him, and he, said M. F. Ball, placed once in jeopardy of life and liberty and acquitted of said offense in a court of competent jurisdiction and by a judgment of said court, made and entered, discharged. (Rec., pp. 145, 146.)

The fourth assignment is as follows:

The court erred in sustaining the motion made by the district attorney to strike out the special plea of former jeopardy and former conviction of the defendants J. C. Ball and R. E. Boutwell, filed herein on the 25th day of April, A. D. 1894, which said special plea and motion are made parts of the records in this case, here referred to, and made a part hereof, because said special plea of said defendants showed that the matters charged in indictment No. 3, presented to the circuit court of the United States, eastern district of Texas, and the matters charged in the indictment in this case are for one and the same transaction and offense, to wit: For the shooting, assaulting, killing, and murdering Wm. T. Box; that at the time said indictment No. 3 was presented against said defendants in said court the

Government's prosecuting officer and the grand jury that returned the same knew that Wm. T. Box was dead; that the Government through its duly constituted grand jury and prosecuting officer had and did by the finding and presenting of said indictment No. 3 in said circuit court in and for the eastern district of Texas (which said indictment No. 3 is a part of the record in this case, here referred to, and made a part hereof) against the said defendants J. C. Ball and R. E. Boutwell, carved out of the shooting, assaulting, killing, and murdering of said Wm. T. Box a lesser offense than that of murder—that is to say, the Government, through its said grand jury and prosecuting officer, carved out of said shooting, assaulting, killing, and murdering of Wm. T. Box, by the presentation of said indictment No. 3 in said court, the offense of an assault to kill and murder the said Box, and upon said indictment No. 3 the said defendants J. C. Ball and R. E. Boutwell were placed upon trial in said circuit court before a jury duly selected, empannelled, and sworn, and a verdict of guilty of said offense returned against them by said jury, upon which a judgment of said court was pronounced and entered against them, adjudging them, the said J. C. Ball and R. E. Boutwell, guilty of said offense, and said defendants thereby placed once in jeopardy and the Government thereby barred from prosecuting them for the crime of murder. (Rec., pp. 140, 141.)

The special plea of J. C. Ball and R. E. Boutwell is as follows:

And now come the defendants J. C. Ball and R. E. Boutwell herein, and for special plea herein they say:

First. That on the 17th day of October, A. D. 1889, the grand jury for the United States of Amer-

ica, empaneled in the circuit court for the eastern district of Texas, holding sessions at Paris, Texas, returned and presented in said court a bill of indictment, numbered 3, against these defendants and M. F. Ball, charging them jointly with the same overt acts that are charged in the indictment numbered 230 that defendants are now called to answer; a certified copy of said indictment No. 3 is hereto attached, marked "Exhibit A" for identification, and made a part hereof; that the facts and acts charged in said indictment No. 3 were and are the same identical acts and transaction charged in the indictment No. 230 herein.

Second. On the 30th day of October, A. D. 1889, these defendants and their codefendant, M. F. Ball, were arraigned and placed on trial in said circuit court of the eastern district of Texas, upon all the charges and offenses charged in said indictment No. 3, as will appear from a certified copy from the record of said court hereto attached, marked "Exhibit B" for identification, and made a part hereof.

Third. On the 3d day of November, A. D. 1889, the jury empanneled in said court in said cause returned into court a verdict in words and figures as follows, viz: "We, the jury, find the defendants J. C. Ball and R. E. Boutwell guilty as charged in the indictment, and we find M. Filmore Ball not guilty. Nov. 3rd, 1889. A. P. Ball, foreman."

Fourth. Said verdict was received in said cause without any objection from either of the defendants and by the court ordered filed and the jury discharged. Upon the return of said verdict the court then and there entered its judgment in words and figures as follows, to wit: "It is therefore considered by the court that the defendants J. C. Ball and R. E. Boutwell are guilty as charged in the in-

dictment herein and as found by the jury, and it is ordered that they be remanded to the custody of the marshal and be by him committed to the county jail of Lamar County to await the judgment and sentence of the court. It is further ordered that the defendant M. F. Ball be discharged and go hence without day." All of which is apparent from the record in said cause, certified copies of which are hereto attached, marked "Exhibit C," and made a part hereof.

Fifth. Defendants allege that they were, by virtue of said verdict and judgment or order remanding said defendants to jail to await the judgment and sentence of the court, held in Lamar County jail until the present indictment, No. 230, was presented and filed against these defendants and their codefendant, M. F. Ball, after which time said case, No. 3, was dismissed without the knowledge or consent of these defendants, and they were then required to give bond to answer the charge in said indictment No. 230.

6th. Defendants show to the court that said indictment No. 3, aforesaid, charged these defendants and their codefendant with unlawfully and with malice aforethought shooting and wounding William T. Box; that said indictment was a good and sufficient indictment, fully charging them, and each of them, with the offenses of assault with intent to kill; that the shooting and wounding of William T. Box charged in said indictment No. 3 is the same identical shooting and wounding of William T. Box as charged in indictment No. 230 that they are now called upon to answer, and is one and the same shooting, and one and the same time, place, and transaction. That if said William T. Box ever died from gunshot wounds as charged in said indictment No.

230, that he died before the said indictment No. 3 aforesaid was presented, which fact was known to the district attorney who drew the bill of indictment and to the grand jury that presented same before the same was presented; that the facts proved upon the trial of these defendants upon indictment No. 3 showed that Box was dead at the time they were tried on said indictment charging them with an assault with intent to kill William T. Box, by reason of which presentation of said indictment No. 3 and the empanneling and swearing the jury and arraigning these defendants for trial aforesaid defendants say they were put in jeopardy for the same offense which they are now called to answer; that since the death of the said William T. Box the Government, by its legally constituted grand jury and circuit court aforesaid, and without the consent of either of these defendants, carved out of the shooting and wounding of William T. Box the offense of an assault with intent to kill, and tried and convicted these defendants, from which said conviction for and assault with intent to kill these defendants have never appealed; that if the court trying these defendants failed to render judgment upon the verdict of the jury finding these defendants guilty of an assault with intent to kill as charged in indictment No. 3, it is no fault of these defendants; that they, nor either of them, has ever objected to a legal judgment being rendered upon said verdict finding defendants guilty as charged in said indictment No. 3.

All the objections the defendants ever made to the judgment of the court trying them was to the judgment sentencing them to death, which said judgment was not supported by the indictment and verdict of the jury; that there is no order or judgment of this court vacating and setting aside said

verdict unless the same was vacated and rendered void by the action of this court in dismissing said case No. 3, aforesaid.

Wherefore these defendants plead specially said facts in bar of further prosecution for the alleged shooting and wounding William T. Box, and pray that they be discharged and go hence without day. (Rec., pp. 6–8.)

The exceptions to the special plea and motion were as follows:

Now comes the United States of America, by and through Robert E. Hannay, the United States attorney in and for the eastern district of Texas, and excepts to the special plea of the defendants filed herein, and moves the court to strike out and hold the same for naught for the following reasons, to wit:

First. Because the said special plea does not set forth the bill of indictment number 3 referred to therein, and does not set forth the records or any part thereof of the proceedings before the said court based upon said bill of indictment, and does not set forth the motion in arrest of judgment and other records filed in the said cause, and does not set forth the judgment of the Supreme Court, in which said indictment is held valid for assault only, and in which said cause was remanded for further proceedings in the said circuit court.

Second. Because the said special plea should be made to speak the truth concerning all the proceedings which have been had in the said circuit and the said Supreme courts in the above styled and numbered cause.

Third. Because the said defendants and none of them have been tried in the said circuit court upon a valid indictment for the murder of William T.

Box. That the bill of indictment number 3, referred to in the said special plea of the defendants, and upon which the defendants were put to trial, was insufficient in law, and was void, and was in form and substance so defective that no valid judgment could have been entered of record in any cause or proceeding based upon said bill of indictment.

Fourth. Because none of the said defendants have been in legal jeopardy by virtue of any proceeding based upon said void, defective, and insufficient indictment, and the said defendants and none of them have been legally tried for the crime of murder, as set out in the indictment filed herein and numbered 230.

Fifth. Because whatever acquittal or conviction there may have been in the said former proceeding was void and should go for naught; and further, because no penalty had been inflicted or attempted to have been inflicted upon the said defendants, or either of them, upon any judgment or order of the said circuit court based upon said void proceeding; and further, because no punishment or penalty could have been legally inflicted upon said defendants, or either of them, upon any such order or judgment. (Rec., pp. 10, 11.)

The court overruled the pleas. (Rec., p. 11.)

The seventeenth assignment is as follows:

The court erred in refusing to give to the jury the special charge No. 4 asked by the defendants J. C. Ball and R. E. Boutwell, which said special charge is as follows:

"4th. If you believe from the testimony in this case that the defendants J. C. Ball and R. E. Boutwell are the same identical J. C. Ball and R. E. Boutwell charged in indictment No. 3 introduced in

evidence herein, and if you further believe that said indictment No. 3 charged the said J. C. Ball and R. E. Boutwell with the same transaction and offense as the indictment herein charges them with, i. e., the shooting, wounding, assaulting, killing, and murdering of Wm. T. Box in the Chickasaw Nation, Indian Territory, and if you further believe from the testimony that at the time said indictment No. 3 was returned against said defendants that the grand jury that returned the same and the Government's officer who drew said indictment No. 3 knew that Wm. T. Box was dead at the time they so drew said indictment, and that he died from the infliction of the gunshot wound charged to have been inflicted by these defendants, and if you further believe that said defendants were arraigned, tried, and convicted upon said indictment No. 3 by a jury duly selected, empanneled, and sworn, then I charge you that the defendants J. C. Ball and R. E. Boutwell were each charged in said indictment No. 3 with an assault to kill and murder the said Wm. T. Box, and that the Government of the U. S., through its officers aforesaid, by presenting in this court said indictment No. 3, carved out of the shooting and wounding, killing, and murdering of Wm. T. Box a lesser offense than murder, to wit, assault to commit murder, and by the empanneling and swearing the jury to try said defendants upon said indictment, and in requiring said defendants to plead thereto, the Government has waived its rights to prosecute said defendants for the crime of murder, and is now estopped from claiming a conviction in this case for any offense higher than an assault to murder, and you will therefore find the special plea of said defendants, pleading former jeopardy and former conviction, to be true."

And the court erred in his general charge to the jury, wherein he charged them as follows: "The

defendants J. C. Ball and R. E. Boutwell have filed a plea that they were tried in this court under an indictment that was good for an assault with intent to kill and were found guilty of this offense, and consequently the court no longer has jurisdiction to try them for murder, because they say they have been convicted of a lower degree, and therefore can not be again convicted for murder. You will find against that plea, for the reason the Supreme Court held the indictment bad for murder and do not say that it charged an assault to murder, and you are instructed to find against that plea."

Because it was admitted upon the trial of this cause that the offense charged in indictment No. 3 returned into the circuit court of the United States in and for the eastern district of Texas on the 17th day of October, A. D. 1889, by a grand jury duly empanneled in said court, which said indictment is made a part of the record in this cause, and here referred to and made a part hereof, and indictment No. 230, returned into said court on the 7th day of May, A. D. 1891, and upon which these defendants have been tried and convicted in this case, is for one and the same transaction and offense, that is to say, for the killing and murdering of Wm. T. Box by the defendants herein; that the M. F. Ball, J. C. Ball, and R. E. Boutwell named in the indictment No. 3 are the same M. F. Ball, J. C. Ball, and R. E. Boutwell named in the indictment herein, No. 230, and are not other and different persons, and the uncontroverted evidence in this case, which was admitted without any objection being made thereto, shows that the defendants J. C. Ball and R. E. Boutwell were tried upon said indictment No. 3 in the circuit court of the United States in and for the eastern district of Texas, at Paris, Texas, and convicted of the offense

therein charged, prior to the time indictment No. 230 herein was returned into said court; that the Government's officer who drew said indictment No. 3 knew at the time he drew the same, and the grand jury was aware at the time they returned the same into this court, that the said Wm. T. Box was dead at that time, and that he died from the infliction of the gunshot wounds charged to have been inflicted upon him by these defendants; that said indictment No. 3 charged these defendants with an assault to kill the said Wm. T. Box, and the Government, by the presenting of said indictment No. 3, carved out of the offense of shooting, wounding, assaulting, killing, and murdering of said Box the lesser offense of assault to kill and murder, and was thereby estopped from presenting against these defendants indictment No. 230 herein, charging them with the higher crime, to wit, murder. (Rec., pp. 147, 148.)

Assignments III and XV, which cover the defense of *autrefois acquit* of M. F. Ball, are discussed together on pages 4 to 25 of the brief. Assignments IV and XVII, which cover the defense of *autrefois convict* of J. C. Ball and R. E. Boutwell, are discussed together on pages 25 to 37 of the brief.

W. T. Box was killed on June 26, 1889. (Rec., pp. 32, 49, 50.)

The indictment upon which the pleas of former jeopardy are based was found October 17, 1889, which was within a year and a day from the infliction of the injuries.

The two indictments are identical, with the exception that the indictment in this case has the sentence in the original indictment concluding with the words "did languish, and languishing did die" amended so as to read,

"and languishing did *then and there instantly die, and did then and there within a year and a day after the infliction of the said mortal wound as aforesaid.*" (Compare indictments, Rec., pp. 2 and 8.)

The third, fourth, and fifth grounds of the exceptions to the pleas raise the issue whether or not the defendants were ever in jeopardy under the first indictment.

The requests above set out and which were refused, and the portions of the charge which were excepted to, raise the same question.

If they were in jeopardy then the court erred and there must be a reversal as to all of the defendants.

The defenses set up the same facts and are in substance the same, except that M. F. Ball pleads *autrefois acquit* and the others *autrefois convict.*

Therefore, the third, fourth, fifteenth, and seventeenth assignments will be treated together.

This court held, on writ of error sued out in the former case by Boutwell and J. C. Ball, that the indictment for murder was fatally defective, reversed the judgments, and remanded the cause "*with a direction to quash the indictment and for such further proceedings in relation to the defendants as to justice may appertain.*" (*Ball* v. *United States*, 140 U. S., 118, 136.)

In the opinion the court said:

> And while it may be conceded that as this indictment was found on the 17th of October, 1889, and the day of the assault is fixed as on the 26th of June of that year, and it is asserted that Box died, the failure to aver the time of death is not fatal, we hold that the omission to state the place is so. By

> section 1035 Rev. Stat. a party may be found guilty of any offense the commission of which is necessarily included in that with which he is charged in the indictment, or may be found guilty of an attempt to commit the offense so charged. The verdict found the defendants guilty as charged, and the order of November 15 used no other language. Defendants were well charged with assault, but not with murder, and the verdict must be held to have related only to that which was well charged, upon which no such judgment as that before us can be sustained (p. 136).

On that opinion the argument for plaintiffs in error is based.

It is said that the court has held that the indictment, while it did not charge murder, well charged an assault; that the verdict related to what was well charged; that by section 1035 of the Revised Statutes a party may be found guilty of any offense the commission of which is necessarily included in that with which he is charged in the indictment, or may be found guilty of an attempt to commit the offense so charged. (Brief, pp. 18, 19.)

It is next said that "by reason of the provisions of section 1035, R. S., an assault with intent to kill is included in every indictment for murder, and that offense is included in indictment No. 3." (Brief, p. 19.)

It is next said that the indictment, if it well charged an assault, as the court said, necessarily well charged "an assault with intent to commit murder," for it included every ingredient requisite to charge murder except time and place, and that "the malice aforethought" charged involved "unlawful intent." (Brief, pp. 18, 19.)

In conclusion, it is said that M. F. Ball was acquitted and the others were convicted of the felonious charge of assault with intent to commit murder and that this constitutes a plea in bar of this indictment. (Brief, pp. 18, 19, 25, 36.) In short, as to Boutwell and J. C. Ball, it is said that the court, after holding that they were well charged with an assault, and that under section 1035 a party indicted for an offense may be convicted of an attempt to commit the offense charged, and that the verdict related to what was well charged, committed the error of remanding the cause and directing the indictment to be quashed and the prisoners to be turned loose in a way that they could not be tried under a new indictment, instead of ordering them to be sentenced upon the verdict of guilty of assault with the intent to commit murder.

If plaintiffs in error were well charged with assault with intent to commit murder, and could have been convicted *under the facts proven*, then the pleas are a good defense.

The acquittal of M. F. Ball would bar a further prosecution of him, and the other two, though twice found guilty, would go scot-free because *no proper judgment was entered on the former verdict*.

It is confidently insisted for the Government that no such result has been reached, and that there is a misunderstanding of the opinion referred to.

The court did not hold that an indictment for murder, fatally defective in charging murder, would sustain a conviction of "an attempt to commit murder."

There is a wide difference between saying that "a party may be found guilty of any offense, the commission of which is necessarily included in that with which *he is charged* in the indictment, or may be found guilty of an attempt to commit the offense so *charged*," and saying that "a party may be found guilty of any offense, the commission of which is necessarily included in that with which he was *sought to be, but was not effectually, charged* in the indictment, or may be found guilty of an attempt to commit the offense so sought to be charged."

Necessarily included, does not mean, arising out of the same facts, but, embraced as a crime within that charged. Murder, as will be hereafter shown, only included manslaughter. This is murder as known at the common law, and it does not embrace assaults of any kind which were only misdemeanors.

Besides, section 1035 only applies where "such attempt be itself a separate offense." There is no United States statute making an "attempt to murder" a separate offense.

The common law, which made it a separate offense and a *misdemeanor*, is no part of the criminal law of the United States. The proviso of section 1035 limits it to such sections as 5415, Revised Statutes, where the "attempt" is made a crime.

The evidence on indictment No. 3 showed that Box was killed when the assault was made. Defendants, therefore, could not have been found guilty of an attempt to commit murder upon evidence showing that murder had actually been committed. There could be no attempt to commit a crime which had been consummated, for the

attempt, under such facts, would be merely a step which would be merged in the perfected crime.

In the *Sparf Case* (156 U. S., 63) this court said:

> The court below assumed, and correctly, that section 1035 of the Revised Statutes did not authorize a jury in a criminal case to find the defendant guilty of a less offense than the one charged, unless the evidence justified them in so doing.
>
> Congress did not intend to invest juries in criminal cases with power arbitrarily to disregard the evidence and the principles of law applicable to the case on trial. The only object of that section was to enable the jury, in case the defendant was not shown to be guilty of the particular crime charged, *and if the evidence permitted them to do so*, to find him guilty of a lesser offense necessarily included in the one charged, or of the offense of attempting to commit the one charged. Upon a careful scrutiny of the evidence, we can not find any ground whatever upon which the jury could properly have reached the conclusion that the defendant Hansen was only guilty of an offense included in the one charged, or of a mere attempt to commit the offense charged. A verdict of guilty of an offense less than the one charged would have been in flagrant disregard of all the proof, and in violation by the jury of their obligation to render a true verdict. There was an entire absence of evidence upon which to rest a verdict of guilty of manslaughter or of simple assault. A verdict of that kind would have been the exercise by the jury of the power to commute the punishment for an offense actually committed, and thus impose a punishment different from that prescribed by law.

Furthermore the court did not hold that J. C. Ball and Boutwell were convicted, or could have been convicted of assault upon the indictment and the evidence.

While it was said that defendants were well charged with assault, and that the verdict could only be held to have related to what was well charged, *the action of the court in ordering the indictment to be quashed, and in not remanding for a sentence in accordance with such a verdict upon such an indictment, shows conclusively that it was not held that upon a defective indictment for murder, where the evidence showed that death took place before the indictment was found there was a conviction of an assault with intent to murder, or that there could be a conviction of an assault.*

LAW IN FORCE IN INDIAN TERRITORY.

Section 2145 of the Revised Statutes provides as follows:

> Except as to crimes, the punishment of which is expressly provided for in this title, the general laws of the United States as to the punishment of crimes committed in any place within the sole and exclusive jurisdiction of the United States, except the District of Columbia, shall extend to the Indian country.

Section 2142 of the Revised Statutes provides as follows:

> Every white person who shall make an assault upon an Indian or other person, and every Indian who shall make an assault upon a white person within the Indian country, with a gun, rifle, sword, pistol, knife, or any other deadly weapon, with intent to kill or maim the person so assaulted, shall be punishable by imprisonment, at hard labor, for not more than five years nor less than one year.

On this statute the argument for plaintiffs in error is largely founded. (Brief, pp. 17, 18, 21.)

Section 2142 was superseded by section 25 of the *Act of March 1, 1889* (1 Supplement to the Revised Statutes, 675), which is as follows:

> That if any person in the Indian country assault another with a deadly weapon, instrument, or other thing with an intent to inflict upon the person of another a bodily injury, where no considerable provocation appears or where the circumstances of the assault show an abandoned and malignant disposition, he shall be adjudged guilty of a misdemeanor, and on conviction shall be fined in any sum not less than fifty nor exceeding one thousand dollars and imprisoned not exceeding one year.

Section 28 provides "that all laws and parts of laws inconsistent with the provisions of this act be and the same are hereby repealed."

Section 2142 of the Revised Statutes, and section 25 of the act of March 1, 1889, can not stand together, for the same facts which would justify a conviction under 2142 would justify a conviction under 25. A person could not be guilty of two crimes denounced by separate statutes upon the same state of facts.

If these defendants could have been guilty at all under the first indictment, it would have been necessary to find them guilty under section 25; for it is a well settled rule that where, upon the same state of facts, two crimes are defined, that which is the mildest will prevail, and this is especially true when it arises from a subsequent enactment, as in this case.

This act went into effect before the crime charged in this case was committed, which was on June 26, 1889.

The law applicable to the crime of murder is set forth in section 5339 of the Revised Statutes, as follows:

> Every person who commits murder—
> First. Within any fort, arsenal, dockyard, magazine, or in any other place or district of country under the exclusive jurisdiction of the United States * * * shall suffer death.

Section 5342, applicable to "attempts to commit the crime of murder or manslaughter," is not applicable to this case, for the assault here was "with a dangerous weapon."

Section 5346, providing for assault, has no application, as it is limited to offenses committed upon the water.

Thus the only crimes in the Indian country growing out of injury to the person made punishable are assault with a deadly weapon where no considerable provocation appears, which is, under the act of March 1, 1889, made a *misdemeanor*, and "murder." Assault and assault with intent to commit murder are not separate offenses when there was murder.

MURDER AND WHAT THE CHARGE INCLUDES AND WHAT NOT IN RESPECT OF PLEA OF FORMER JEOPARDY.

While there are no common-law offenses against the United States (*United States* v. *Hudson*, 7 Cranch, 32; *United States* v. *Britton*, 108 U. S., 206; *United States* v. *Eaton*, 144 U. S., 687), yet in the use of words in statutes it can not be doubted that they were adopted with the meaning given them by the common law, unless an intention to modify them appears. (*Pennock* v. *Dialogue*, 2 Pet., 1, 21; *McDonald* v. *Hovey*, 110 U. S., 619, 628; see also *United States* v. *Knight*, 156 U. S., 10.)

If a good indictment for murder, *and evidence making out the same case as this*, would sustain a conviction for assault, or for an assault with intent to commit murder, on the theory that these were minor offenses necessarily included within the charge of murder, then it would follow that the plea of M. F. Ball that he was acquitted, and of J. C. Ball and Boutwell that they were convicted and that they have been once in jeopardy, would be good.

If, on the contrary, upon the proof of felonious, willful, malicious assault, *with death intervening within the jurisdiction, before indictment, within a year and a day*, upon an indictment for murder, there could be no conviction for assault, or assault with intent to kill, then the pleas must fail.

The Government relies on the following propositions:

A.

Former jeopardy is not a good defense where the acquittal or conviction was upon an indictment insufficient in form and substance to sustain a conviction. (*People* v. *McNealy*, 17 Cal., 333; *People* v. *March*, 6 Cal., 543; *Black* v. *State*, 36 Ga., 447; *Mount* v. *Com.*, 2 Duv. (Ky.), 93; *Com.* v. *Bakeman*, 105 Mass., 53; *Cochrane* v. *State*, 6 Md., 400; 2 Hale, P. C., 245, 248; *State* v. *Williams*, 5 Md., 82; *People* v. *Cook*, 10 Mich., 164; *Kohlheimer* v. *State*, 39 Miss., 548: *Walton* v. *State*, 3 Sneed, (Tenn.), 687; 2 East, P. C., 519; *Rex* v. *Vandercomb*, 2 Leach, Crown Cas., 708; *Reg.* v. *Vaux*, 4 Coke, 44a; *Weston* v. *State*, 63 Ala., 155; *People* v. *Barrett*, 1 Johns. (N. Y.), 66; *Munford* v. *State*, 39 Miss., 558; *Hite* v. *State*, 9

Yerg. (Tenn.), 357; *People* v. *Clark*, 67 Cal., 99, 7 Pac., 178; *Pritchett* v. *State*, 2 Sneed (Tenn.), 285; *Gerard* v. *People*, 3 Scam. (Ill.), 363; *State* v. *Ray*, Rice (S. C.), 1; *State* v. *Meekins*, 41 La. Ann., 543, 6 South., 882; Clark's Criminal Procedure, p. 389; *Wiggs Case*, 4 Co., 46b; *United States* v. *Gilbert*, 2 Sumn. 19, 40.)

B.

Assaults, batteries, and wounding were misdemeanors at common law. (Blackstone, IV, 216.)

The assault, the punishment for which is provided for in the *Act of March 1, 1889* (1 Supplement to the Revised Statutes, 675), is not only made a misdemeanor in name, and thus distinguishable from a felony, but the punishment that can be imposed, which is imprisonment not exceeding a year, takes it out of the class of felonies, even if it had not been distinctly declared to be a misdemeanor, for it is not infamous.

A felony could only be proceeded against *by a presentment or indictment of a grand jury.*

A misdemeanor may be proceeded against by an information filed by a district attorney, without the presentment of a grand jury. (*Mackin* v. *United States*, 117 U. S., 348.)

C.

At common law the "attempt to commit murder" was a distinct offense and punishable as a misdemeanor. (Russell on Crimes, vol. 1, p. 719.)

Bishop, in his work on criminal law, section 604, defines "attempt" as follows:

> If a man undertakes to do a thing which in law is a crime, and, after proceeding a certain way in the doing, is interrupted, or if his effort otherwise miscarries, so that the intended crime is not committed, he is still indictable for what he does, under the name of "attempt."

See also A. and E. Enc. of Law, vol. 4, p. 659.

Attempt to rob, to steal fish, to sell counterfeit money, to rescue, to bribe, were punishable, but these were special cases provided for by statute. Chitty's Blackstone, Vol. IV, star pages 242 and n., 235 and n., 100 (n.), 131 (n.), 140 (n.).

The conviction of an attempt to commit a crime, if the evidence shows a failure of accomplishment, is based on statutes. (*In re Lloyd*, 51 Kans., 501; *State* v. *Frank*, 103 Mo., 120.)

But those statutes usually provide that there can be no conviction for attempt where the evidence shows accomplishment. (*State* v. *Lacey*, 111 Mo., 513; *State* v. *White*, 35 Mo., 500; *State* v. *Mitchell* (Kans.), 38 Pac., 810.)

Thus, where actual perpetration is proven the attempt can not logically exist as a crime, but is a part of and merged in the greater offense.

D.

At common law there could not be a conviction of simple assault, assault and battery, or assault with intent to kill—all of which were misdemeanors—on an indictment for

murder or manslaughter. (1 Chit. Cr. Law, 251; *Rex* v. *Westbeer*, 1 Leach Crown Cases, 14, 2 Strange, 1133; *Com.* v. *Roby*, 12 Pick., 496; Russell on Crimes, vol. 1, p. 778; Clark's Criminal Procedure, p. 351; *Wright* v. *State*, 5 Ind., 527; *State* v. *Scott*, 24 Vt., 127, 129; *State* v. *Johnson*, 1 Vroom (N. J.), 185, 186.)

(This was changed by statute, 1 Vic., c. 85, sec. 11. Russell on Crimes, vol. 1, p. 778.)

While it is admitted (p. 21 of the brief) that there could not be at common law a conviction of a misdemeanor on an indictment for felony, it is contended that this rule has been changed in some of the States.

It is true that the rule has been departed from in some of the States. Some have enacted statutes, and in others the courts have changed the rule.

It is insisted (brief, p. 21) that this qualification of the common law is in effect abolished by section 1035 of the Revised Statutes. Section 1035 of the Revised Statutes only applies, as has been shown, where the attempt to do the act charged is made by statute a separate offense.

There is no United States statute making an attempt to commit murder an offense. There could be no indictment merely for an attempt to commit murder.

It is contended for the Government that if indictment No. 3 had, instead of being for murder, been for "an attempt to commit murder," there could have been no conviction, as there is no such crime defined or made punishable under United States law.

It is insisted (p. 21 of the brief) that the assault with intent to kill is a felony under section 2142, but, as shown

above, this section was superseded by the act of 1889, and therefore the offense was murder or a misdemeanor, and if death had intervened at the time of the indictment there could not be anything less than murder.

The brief (p. 21) adopts the rule laid down by Mr. Wharton: "Where the evidence necessary to support the second indictment would have been sufficient to procure a legal conviction upon the first, the plea is generally good."

It is sought then (brief, p. 22) to test this case by that rule, but it will be observed that the test is put upon the proposition that "an acquittal of an assault with intent to kill will bar an indictment for murder."

This, of course, is not sound, unless there could have been an indictment under the United States law for an assault with intent to kill, and unless the indictment upon which there was an acquittal included within its terms the offense of "an assault with intent to kill," both of which propositions are denied.

In this connection (p. 22 of the brief) it is sought to make the plea good under the contention that for murder the prosecutor may carve out as large an offense as he can, but can carve only one.

This doctrine can only apply where the offense carved out is included in the larger offense. This has no application to a misdemeanor and the offense of murder. It can have no application unless the lesser is included in the greater, and, as has been shown, there could be no conviction of misdemeanor on the charge of murder.

It will further be shown that there could be no conviction at common law for an assault, or an assault with

intent to commit murder, when the facts showed that death actually intervened at the time of the assault.

E.

There could not be a joinder in the same indictment at common law for a misdemeanor and a felony. (1 Chit. Cr. Law, 251, 254, 639; *Rex* v. *Gough*, 1 Moody & R., 71; *Storrs* v. *State*, 3 Mo., 9; *Scott* v. *Com.*, 14 Grat. (Va.), 687; *United States* v. *Sharp*, 1 Peters C. C., 131; *Rex* v. *Cross*, 1 Ld. Raym., 711; *United States* v. *Scott*, 4 Biss., 29, 30, Fed. Cas. No. 16, 241; *Davis* v. *State*, 57 Ga., 66.)

F.

While an acquittal or conviction on one indictment would bar a subsequent indictment, if the minor offense was included in the first charge, and the defendant could have been convicted of it, yet this rule can not apply where one indictment was for a felony and the other for a misdemeanor. (Clark's Criminal Procedure, p. 398; 1 Chit. Crim. Law, 456; 2 Hawk. P. C., c. 35, sec. 5; *Crosby* v. *Leng*, 12 East, 415; *Com.* v. *Roby*, 12 Pick. (Mass.), 504; *Wright* v. *State*, 5 Ind., 527.)

G.

Where a felony merges the misdemeanor arising out of the same act, there could be no conviction or indictment for misdemeanor on proof of a felony. (Clark's Crim. Proc., p. 398; Wharton's Criminal Pleading and Practice, secs. 456, 465 (9th ed., p. 330); *Wright* v. *State*, 5 Ind., 527; *State* v. *Hattabough*, 66 Ind., 223; *State* v. *Cooper*, 1 Green (N. J.), 361, 373.)

H.

Therefore, where an assault is a misdemeanor, an acquittal or conviction on indictment for assault with intent to murder will not bar a prosecution for murder. (Clark's Crim. Proc., p. 399; *Com.* v. *Roby*, 12 Pick. (Mass.), 502; *State* v. *Hattabough*, 66 Ind., 223; *Sevrin* v. *People*, 37 Ill., 414; *People* v. *Saunders*, 4 Parker Crim. R. (N. Y.), 196; *Murphy* v. *Com.*, 23 Grat. (Va.), 960.)

The proof of death within the jurisdiction of the court and within a year and a day from the stroke which was inflicted within the jurisdiction, establishes the crime of murder.

There could not have been but one crime at common law under this state of facts. What would have been a misdemeanor, if death had not followed, merged in the felony.

Therefore, there could have been no conviction of an attempt to commit murder, nor of the assault which was made a misdemeanor by the act of March 1, 1889, upon the proof of the facts necessary to sustain this indictment.

(I.)

To sustain pleas of autrefois acquit and convict it must appear that the offenses are the same in fact and in law, and that there could have been a conviction under the first indictment on proof of the facts charged in the second. (Clark's Criminal Procedure, 383 (e); *Burns & Cary* v. *People*, 1 Parker, 182; *Rex* v. *Vandercomb*, 2 Leach's Crown Law, 708, 717, 720; *Rex* v. *Plant*, 7 Car. and P., 575; *Com.* v. *Clair*, 7 Allen (Mass.), 525, 526; *Com.* v.

Babser, 14 Gray (Mass.), 83, 84; *Com.* v. *Roby*, 12 Pick., 496; *Freeland* v. *The People*, 16 Ill., 380; *State* v. *Foster*, 33 Iowa, 526; *Com.* v. *Bakeman*, 105 Mass., 53, 59; *The People* v. *Saunders*, 4 Parker, 196.)

In the De Salvi Case, reported as a note to the Morris Case (X Cox Cr. Cas., p. 481, *et seq.*), Pollock, C. J., said:

> We are of opinion that this is not a good plea. The prisoner is now indicted for murder, and murder may be committed without any intent to kill. * * * On the former occasion the prisoner was charged with wounding with intent to kill. The jury found that he did not intend to kill, and there the intention was of the essence of the crime; that is not so in the present indictment; it is not necessary here to prove an intention to kill, it is only necessary to prove an intention to inflict an injury that might be dangerous to life, and that it resulted in death; that is sufficient to sustain the present charge. Try this by the very test presented to us. It is said that it is no bar to the second indictment that a party has been acquitted on the first unless the facts proved on the second indictment might have produced a conviction on the first. But a party may be convicted upon an indictment for murder by evidence that would have no tendency to prove that there was any intent to kill; nay, by evidence that might clearly show he meant to stop short of death, and even took some means to prevent death, but if that illegal act of his produces death, that is murder. * * * It appears to me, therefore, with reference to all the authorities that have been laid before us, that the two offenses are not the same, that the plea can not be supported, and that the prisoner must answer over. I am author-

ized to state that Mr. Justice Crompton and Mr. Baron Watson, before whom the case came at the last sessions, have looked into the matter, and concur in the view now taken.

Martin, B., said:

Now, the offense for which the prisoner has been tried was one of intent, and was therefore complete the moment the stab was given, whereas the offense for which he was now indicted could only be consummated by the death of the party. To the mind of a lawyer this must be deemed conclusive against the plea.

Willes, J., said:

In order to support this plea it must be shown that the former acquittal was an acquittal of all that state of facts which might constitute the party a murderer.

NO JEOPARDY WHERE JUDGMENT REVERSED.

Even if the foregoing be unsound, yet the pleas of J. C. Ball and Boutwell of former jeopardy must fail, because they made a motion for a new trial, after conviction, and by writ of error had the judgment reversed.

The brief for plaintiffs in error says:

Plaintiffs in error J. C. Ball and R. E. Boutwell suggest that they do not now and never have complained at indictment No. 3, nor the verdict rendered thereon; that on the former appeal they urged that said indictment was insufficient to support the sentence of death pronounced against them on that verdict, but the sentence of death was the order appealed from and the one they asked to have reversed (pp. 36, 37).

The trouble about this statement is about the same as Voltaire attributed to the designation of the German Empire in the Middle Ages as "the Holy Roman Empire." He said it was neither "Holy," "Roman," nor "an Empire."

1. The said defendants "moved the court for a new trial, and to arrest the judgment, and suspend sentence upon the verdict of the jury rendered therein, and to set aside and vacate said verdict." (See original record, *Ball et al.* v. *United States*, No. 1351, October term, 1890, p. 7.)

2. The assignments of error in the same record (p. 24), said "they have been tried and convicted without due process of the law of the land."

The first assignment was that "*no legal indictment was returned into court against respondents.*"

The second was that the court erred in overruling the motion of defendants for *a new trial.*

The conclusion was (p. 26), "for the errors stated, and apparent upon the record herein, respondents pray that *the judgment be reversed* and *the cause remanded for a new trial.*"

3. As shown above, the court ordered that the judgments be reversed. (140 U. S., p. 136.)

If a new trial be granted on the defendants' application, the former trial is no bar to a second trial on the same or an amended indictment. (Wharton's Crim. Plead. and Pr., sec. 435 a; Am. and Eng. Enc. of Law, vol. 11, p. 960, and cases there cited; *People* v. *Casborus*, 13 Johns., 351; *Reg.* v. *Drury*, 3 Car. & K., 193; *Com.* v. *Roby*,

12 Pick. (Mass.), 502; *Sutcliffe* v. *State*, 18 Ohio, 469; *Gibson* v. *Com.*, 2 Va. Cas., 111; *People* v. *McKay*, 18 Johns. (N. Y.), 212; *Com.* v. *Gould*, 12 Gray (Mass.), 173; *Lane* v. *People*, 5 Gilm. (Ill.), 305; *State* v. *Lee*, (N. C.), 19 S. E., 375; *State* v. *Knouse*, 33 Iowa, 367; *State* v. *Redman*, 17 Iowa, 329; *Robinson* v. *State*, 23 Tex. App., 315; *People* v. *Barric*, 49 Cal., 342; *Lovett* v. *State*, 33 Fla., 389; *Gannon* v. *People*, 127 Ill., 507; *People* v. *Schmidt*, 64 Cal., 260; *People* v. *Hardisson*, 61 Cal., 378; *State* v. *Rhodes*, 112 N. C., 857; *Veatch* v. *State*, 60 Ind., 291.)

After a reversal, they were not again in jeopardy until the new indictment and trial, and the fact that the indictment was quashed or that the case was dismissed would make no difference, for there could be no jeopardy until the jury was impaneled. (*McKenzie* v. *State*, 26 Ark., 334.)

The entry of a nolle prosequi by competent authority does not put an end to the case, and is no bar to a subsequent indictment for the same offense. (*United States* v. *Shoemaker*, 2 McLean, 114; *Com.* v. *Wheeler*, 2 Mass., 172; *Com.* v. *Lindsay*, 2 Va. Cas., 345; *Wortham* v. *Comm.*, 5 Rand., 669; *State* v *Blackwell*, 9 Ala., 79.)

On page 36 of the brief it is said that "the dismissal of indictment No. 3 after verdict of conviction is equivalent to an acquittal. (*Fletcher* v. *United States*, 9 Fed. Cases, 274; 1 Whar. Crim. Law, secs. 544 and 513; *State* v. *Elden*, 41 Me., 165.)"

In the cases cited there was a dismissal of the indictment after a conviction, without a new trial or reversal, and therefore they have no application to the question under consideration.

If in the plea of autrefois convict there be an averment of the reversal of the judgment and dismissal of the indictment, the plea would be bad. (*State* v. *Thurston*, 3 Heisk., 67; *Bedee* v. *People*, 73 Ill., 320.)

The record will be worthless in evidence if it shows that the indictment was quashed. (*Faulk* v. *The State*, 52 Ala., 415; *Steck* v. *State*, 28 Ark., 113.)

ASSIGNMENT II.

Assignment No. 2, discussed on pages 37 et seq. of the brief for plaintiffs in error, is as follows:

> The court erred in refusing to first try the special plea of the defendant M. F. Ball to the jurisdiction of the court, before these defendants were required to announce ready upon the merits of the case (which said special plea is made a part of the record herein, here referred to and made a part thereof), because by submitting said special plea to the jury, together with the other issues in the case, there was created before said jury a multiplicity of issues, was liable to mislead and confuse them, and, by hearing all of the facts, prejudice them against the said M. F. Ball, and thereby influence said jury in finding against his said special plea. (Rec., p. 140.)

It is contended that there should be a reversal as to M. F. Ball, because, as is said in the brief (p. 38), the plea to the jurisdiction was not excepted to; it was sufficient to raise the question, and plaintiff in error M. F. Ball was entitled to have it heard and determined before he was required to plead to the general issue.

The plea appears on pages 11 and 12 of the record. It does not appear in anyway that M. F. Ball insisted on his plea. It was filed April 30, 1894. (Rec., p. 12.)

On the 1st day of May, 1894, he announced ready for trial, and without any action having been taken by the court upon this plea, he entered a plea of not guilty. (Rec., p. 14.)

He thus waived his right to have a preliminary disposition of this special plea, and having failed to ask action of the court upon it, he can not now predicate error thereupon.

He, however, got the benefit of the plea in the trial and under the charge of the court. (Rec., p. 133.)

ASSIGNMENT I.

The first assignment of error, discussed on pages 38 to 45 of the brief, is as follows:

> The court erred in overruling these defendants' amended motion in arrest of judgment, filed herein on the 6th day of June, A. D. 1894, and in not setting aside the judgment entered against the defendants, and in not quashing the indictments upon which these defendants were tried and convicted, because said indictment charges no crime under the laws of the United States, will not support the verdict of the jury finding them each guilty of murder and the judgment of the court adjudging them each guilty of that offense, and because said indictment is fatally defective in this:
>
> First. Said indictment fails to allege upon what part of the body of deceased the fatal wounds were inflicted and fails to give any description of said fatal wounds.
>
> Second. Said indictment fails to allege that deceased, Wm. T. Box, died of the wounds charged to have been inflicted upon his body by these defendants.

Third. Said indictment fails to allege that the deceased, Wm. T. Box, was killed by these defendants, or either of them, at a place within the sole and exclusive jurisdiction of the United States.

Fourth. Said indictment fails to allege facts sufficient to show that the circuit court of the United States in and for the eastern district of Texas, at Paris, Texas, had jurisdiction to try these defendants, or either of them, for the killing and murdering of deceased, Wm T. Box, in that it does not aver that the deceased, Wm. T. Box, or either of these defendants, were not, at the time said deceased was killed, members of any tribe of Indians in the Indian Territory by marriage or adoption, but simply avers that these defendants were not citizens of the Indian Territory.

Fifth. Said indictment fails to allege that the deceased, Wm. T. Box, died within the jurisdiction of the circuit court in and for the eastern district of Texas. (Rec., pp. 139, 140.)

The points insisted on for plaintiffs in error are:

First:

The indictment fails to allege that Box died of the mortal wounds inflicted by plaintiffs in error.

The language, "of which mortal wounds the said William T. Box did languish and languishing did then and there die," is not sufficient. Box may have died from other causes than the mortal wound. It does allege that he languished of the mortal wound, but not that he died. (Brief, p. 42.)

Again:

In the present case the indictment may be true and plaintiffs in error not guilty of murder. Box may have been mortally wounded by a gunshot wound fired by plaintiffs in error; he may have

> languished of the wound and died, but not of the mortal wound inflicted. (Brief, p. 42.)

The language of the indictment is "of which mortal wound the said William T. Box did languish and languishing did then and there instantly die."

The plain intent of this is that he then and there languished and died of the mortal wound. The words "mortal wound" qualify the words "did languish and languishing," and the words "did then and there instantly die." The brief seeks to make it read as follows: "The said William T. Box did languish of said mortal wound and languishing did then and there instantly die."

In *Davies* v. *The King* (10 B. and C., 89, 92) Lord Tenderden said:

> The phrase used is that the defendants "did by night unlawfully enter divers closes, and were then and there in the said closes," etc., not that they "by night did unlawfully enter, and," etc. If the words "by night" had occurred at the beginning of the sentence, they might have governed the whole, or if they had been at the end of the sentence, they might have referred to the whole, but here they are in the middle of the sentence, and are applied to a particular branch of it, and can not be extended to that which follows.

Here the words "of which mortal wound" precede, and therefore are referable to and qualify all that follows. Besides, under the well-settled rule that where but one place had been stated in the indictment, the words "then and there," in the subsequent averment necessarily refer to that place, excludes the construction contended for

here. There is no room for saying that the indictment avers that he languished at any place other than the one place mentioned in the indictment.

Second. The indictment fails to allege the place of death. It is not charged to have taken place within the jurisdiction of the court. (Brief, p. 43.) The brief says:

> The charge that "of which mortal wound the said Wm. T. Box did languish, and languishing did then and there instantly die, and did then and there die within a year and a day after the infliction of the said mortal wound as aforesaid," is not sufficient.
>
> The indictment does not charge "that said Box did then and there languish, and languishing did then and there instantly die." This language does not allege where Box languished, but it imports that he lived after the mortal wound was inflicted, and after languishing did then and there instantly die, i. e., at the place where he languished. The language used by the pleader, "did languish, and languishing did then and there instantly die," clearly imports some lapse of time after the reception of the mortal wound before death occurred; "then and there" employed in the sentence and used after the words "did languish," and refer to the time of the languishing and not to the time of the infliction of the fatal wound. (P. 44.)

This is hypercritical. The indictment avers:

> That one M. F. Ball and one J. C. Ball and one J. E. Boutwell, late of Chickasaw Nation, Pickens County, Indian Territory, in the district and circuit aforesaid, on the twenty-sixth day of June, in the year of our Lord eighteen hundred and eighty-nine, in Pickens County, in the Chickasaw Nation, in the Indian Territory, the same being annexed to and constituting a part of the said fifth circuit, and

annexed to and constituting a part of the eastern district of Texas, for judicial purposes, and being within the jurisdiction of this court did unlawfully, fraudulently, and feloniously, and with their malice aforethought, and with the malice aforethought of each of them, and with a certain deadly weapon, to wit, a certain gun by the said M. F. Ball, J. C. Ball, and R. E. Boutwell then and there held, make an assault in and upon the body of one William T. Box, with said gun held as aforesaid, said gun being then and there loaded and charged with gunpowder and leaden balls, then and there held and used as aforesaid, the said M. F. Ball, J. C. Ball, and R. E. Boutwell did then and there shoot off and discharge the contents of said gun at, in, and upon the body of said William T. Box, inflicting thereon a mortal wound, of which mortal wound the said William T. Box did languish, and languishing did then and there instantly die, and did then and there die within a year and a day after the infliction of the said mortal wound as aforesaid. (Rec., p. 2.)

The language "of which mortal wound the said William T. Box did languish, and languishing did then and there instantly die, and did then and there die within a year and a day after the infliction of the said mortal wound as aforesaid" can bear no other construction than that he died "then and there" where the mortal wound was inflicted. The place and the only place mentioned in any part of the indictment was "in the Chickasaw Nation, in the Indian Territory, the same being annexed to and constituting a part of the said fifth circuit, and annexed to and constituting a part of the eastern district of Texas, for judicial purposes, and being within the jurisdiction of this court."

The words "then and there" are definite and are the controlling words. The words "languishing" and "instantly" are indefinite, and, therefore, are subordinate to the words "then and there."

It is well settled that the words "instantly," "immediately," and "whilst" are ambiguous terms, and can not supply the place of "then and there." If they can not supply the place because they are ambiguous, then still less could they and like words control the meaning of the words "then and there."

Relatives in indictments are not controlled by the strict rules of grammar, and they are held to refer to that antecedent to which the tenor of the instrument and the principles of law require that they should relate, whether exactly according to the rules of syntax or not, and this applies also to such words as "it" and "then and there." (Bishop on Crim. Proc., sec. 355; *Jeffries* v. *Comm.*, 12 Allen (Mass.), 145; *Comm.* v. *Call*, 21 Pick., 515.)

The doctrine is general that the court will consult sound sense, to the disregard of captious objections, in looking for the meaning of allegations in an indictment. Moreover, of two permissible constructions, it will adopt the one sustaining the proceeding. (Bishop on Crim. Proc., vol. 1, sec. 356, 510.)

After mentioning the time and place with certainty, the usual form is not to repeat them but to prefix the words "then and there" to each subsequent averment of fact. (Bishop on Crim. Proc., sec. 408; Whar. Crim. Pl. and Pr., sec. 131.) If only one time and place has

been averred, there can be no uncertainty as to what the words "then and there" refer to.

There would be if more times and places than one had been mentioned. (Bishop on Crim. Proc., sec. 414; Whar. Crim. Pl. and Prac., sec. 133.)

In *Jeffries* v. *The Commonwealth* (12 Allen, 145, 152) the court said:

> We are to give effect to the time and place alleged in the venue as applicable to subsequent parts of the indictment when no other place is named to which they may equally or, as the case may be, directly refer.

Again:

> If it be said that the words "then and there," found in the indictment after the naming of the city of New York as the residence of the persons alleged in the indictment to have authorized the defendant to purchase such linseed, grammatically and therefore legally refer to the next antecedent, that must be taken with some qualification, as was stated by this court in *Commonwealth* v. *Call* (21 Pick., 515), where it was held that words must be referred to that antecedent to which the tenor of the indictment and the principles of law required it should refer, whether exactly according to the rules of syntax or not.

ASSIGNMENT VI.

Severance.

This question is treated in the brief for plaintiffs in error (p. 20 *et seq.*).

It is based on the sixth assignment, which is as follows:

> The court erred in overruling the written motion of the defendants J. C. Ball and R. E. Boutwell,

> filed herein before this case was called for trial, asking that they be awarded a separate trial from their codefendant M. F. Ball, and in forcing them to be tried jointly with their said codefendant M. F. Ball because said motion, which is made a part of the record in this cause and here referred to, stated facts sufficient to entitle them to a separate trial in this cause. (Rec., p. 141.)

The motion for a severance made by M. F. Ball is set out on page 12 of the record.

The motion for a severance made by J. C. Ball and R. E. Boutwell appears on page 13 of the record.

Where several persons are jointly indicted, the question of severance is a matter within the discretion of the court. (Wharton's Crim. Plead. and Prac., Sec. 309; Bishop on Crim. Proc., vol. 1, sec 1018; Archbold's Crim. Prac. and Plead., 8th ed., p. 303, note (1); *United States* v. *Merchant et al.*, 4 Mason, 158).

While the motions are sworn to, the record does not show that any evidence was adduced to sustain them. So far as the record shows, the court acted upon the bare motions themselves.

It certainly was no abuse of the discretion of the court to refuse to grant a severance based upon facts which are not shown except upon the affidavit of the defendants.

ASSIGNMENT VII.

The seventh assignment is discussed on pages 48 and 49 of the brief, and is as follows:

> The court erred in sustaining the objection of the district attorney and in preventing these defendants from proving by the Government witness Joe Cross

how much money he and Ed. Berney (both of whom were material witnesses for the Government in this case) had paid or promised to pay Mr. Owenby for his services in assisting the district attorney in the prosecution of this case, because the same was a legitimate inquiry upon the trial of this cause, in that it tended to show the interest and feeling of said witnesses in this prosecution. (Rec., pp. 141, 142.)

The record shows the following:

Q. Do you know who employed Mr. Birmingham to help prosecute in this case?

A. Yes, sir; Ed. Berney.

Q. He is the one that is here?

A. Yes, sir.

Q. Who employed Mr. Ownby?

A. Ed. Berney and myself employed Mr. Ownby.

Q. You paid him out of your private means?

A. I always pay my debts that way.

Q. How much do you pay him?

(To which question and proposed answer counsel for the Government objected. Defendants' counsel then stated to the court that they desired said proof for the purpose of showing the interest of the witness in this prosecution, as well as to show the interest of Ed. Berney, another material witness for the Government, but the court sustained the objection so made by the Government, and would not permit said question to be answered, to which action and ruling of the court the defendants each at the time excepted.) (Rec., pp. 47, 48.)

Q. You have been interested some in the prosecution of this case, have you not?

A. Yes, sir.

Q. You have assisted in the prosecution of this case?

(To which question and proposed answer counsel for the defendant at the time objected because the same was irrelevant and immaterial, but their objections were by the court overruled and said witness permitted to testify as follows:)

Q. You stated you and Cross employed counsel to help prosecute in this case?

A. Yes, sir.

Q. Was your employment of counsel in this case caused by any ill feeling you had toward these defendants?

(To which question and proposed answer counsel for the defendant at the time objected because the same was irrelevant and immaterial, but their objections were by the court overruled and said witness permitted to testify as follows:)

A. It was not. (Rec., p. 110.)

The material evidence for the jury to consider was the interest and bias of these witnesses. The court permitted it to be shown that they had employed counsel to prosecute. This showed their interest, and the question of the amount paid by them was not material. They paid enough to have his services, and that showed their interest, and the jury could look to this in weighing their testimony.

It was perfectly competent and relevant in this connection to permit the witnesses to testify that in this they were not actuated by ill feeling, and it was for the jury to pass upon this evidence and weigh it for what it was worth.

As has been repeatedly held by this court, the admission and exclusion of evidence and its materiality are largely within the discretion of the trial judge, and his

action in admitting or excluding evidence would not be reversible error unless it appears that the defendants may have been injured. (*Alexander* v. *United States*, 138 U. S., 353; *Holmes* v. *Goldsmith*, 147 U. S., 150; *Moore* v. *United States*, 147 U. S., 150; *Thiede* v. *Utah Territory*, 159 U. S., 510.)

ASSIGNMENT X.

This assignment is discussed on pages 49 to 53 of the brief, and is as follows:

> The court erred in admitting in evidence, over the objection of these defendants, a certified copy of a marriage license under the hand and seal of the clerk of Cooke County, Texas, showing that S. C. Mayfield married Lucy O. Box prior to the time she married the defendant herein, M. F. Ball (which said certified copy was made a part of the record herein and here referred to), because the Government thereby proved the contents of a written instrument by substitutionary evidence without showing the loss or destruction of the original, and because said marriage license, or a certified copy thereof, was not indorsed upon the back of the indictment against these defendants, and because they had no notice whatever that the Government would offer said marriage license or a certified copy thereof in evidence against them, and because said marriage license raised an issue in this case, to wit, the validity of the marriage of M. F. Ball with Lucy O. Box, alias Lucy O. Mayfield, which these defendants, and especially the said M. F. Ball, was not prepared to meet, and did not know would be raised upon the trial of this cause. (Rec., p. 142.)

Two objections are made in the brief:

1. It is said that a certified copy of the marriage license was secondary evidence, and therefore incompetent, without any effort to produce the original and without accounting for its loss or destruction.

The certificate by the clerk of the county court of Cooke County, Tex., was to the effect that it was a true and correct copy of the marriage records of that county. (Rec., pp. 119, 120.)

Article 2842 of the Texas statutes provides:

> The said clerk shall record all licenses so issued by him in a well-bound book kept for that purpose, and it shall also be the duty of the persons solemnizing the rites of matrimony to indorse the same on the license and make return of the same to the office of the clerk of the county court within sixty days after the celebration as aforesaid, which return shall also be recorded as aforesaid.

Article 2252 provides as follows:

> Copies of the records of all public officers and courts of this State, certified to under the hand and seal (if there be one) of the lawful possessor of such records, shall be admitted as evidence in all cases where the records themselves would be admissible; translated copies of all records in the land office, certified to under the hand of the translator and the Commissioner of the General Land Office, attested with the seal of said office, shall be *prima facie* evidence in all cases where the original records would be evidence.

No objection was made to the form of certification. The objection went alone to the admissibility of a certified copy.

The certified copy was competent evidence in the courts of Texas, and therefore was competent in the United States court there held. (*Cavazos* v. *Travino*, 6 Wall., 773, 786.)

A certified copy of the public registry of marriage is competent evidence. It is not "secondary evidence." (Roscoe's Crim. Ev., vol. 1, p. 174; A. and E. Enc. of Law, vol. 14, p. 523.) It is what is sometimes termed a "second original."

The admissibility of the certified copy was objected to on the ground that it was not indorsed upon the back of the indictment against these defendants, and that neither of them had any notice whatever that the said marriage license would be introduced in evidence against them. (Brief, p. 52.)

This objection is based upon section 1033 of the Revised Statutes, which is as follows:

> When any person is indicted of treason, a copy of the indictment and a list of the jury, and of the witnesses to be produced on the trial for proving the indictment, stating the place of abode of each juror and witness, shall be delivered to him at least three entire days before he is tried for the same. When any person is indicted of any other capital offense, such copy of the indictment and list of the jurors and witnesses shall be delivered to him at least two entire days before the trial.

This section is in derogation of the common-law rule. The brief says (p. 52) that "no difference in principle could exist between a document and a living witness."

The difference is not in the principle, but in the statute, and its application. It applies to living witnesses and has no application to documents.

ASSIGNMENT XI.

This assignment, discussed on pages 53 to 56 of the brief, is as follows:

> The court erred in allowing Mrs. L. O. Angling to testify, over the objection of these defendants, that "she thought she was legally married to one of these defendants, to wit, M. F. Ball, but had learned since that she was not legally married to him, and that at the time she so married the defendant M. F. Ball her former husband, C. S. Mayfield, was living; that she had never been divorced from him, and that the defendant M. F. Ball knew that said Mayfield was living at the time she so married the said M. F. Ball," because the said M. F. Ball, prior to the time said witness so testified, introduced in evidence in this case a marriage license, issued by the legal authorities of the Chickasaw Nation, Indian Territory, showing that he, the said M. F. Ball, had, prior to the time Wm. T. Box was killed, married the said witness, and said witness testified, prior to the time said evidence was introduced, that she married the said M. F. Ball under said license and lived with him as his wife up to the time her father, Wm. T. Box, was killed, and that she had never been divorced from him, and was therefore not a competent witness in this case. (Rec., p. 143.)

The reference made on page 53 of the brief under this assignment is to page 143 of the record.

Upon page 143 of the record is nothing but the assignment as set out in the brief.

There is nothing showing that Mrs. Angling testified, over the objection of defendants, that "she thought she was legally married to one of these defendants, to wit, M. F. Ball, but had learned since that she was not legally married to him, and that at the time she so married the defendant M. F. Ball her former husband, C. S. Mayfield, was living; that she had never been divorced from him, and that the defendant M. F. Ball knew that said Mayfield was living at the time she so married the said M. F. Ball."

That part of her testimony which was relevant to this assignment, and which was printed at the instance of plaintiffs in error, appears upon pages 1 and 2 of the supplemental record. She does not say that "she thought she was legally married to one of these defendants, to wit, M. F. Ball." She does not say that she "had learned since that she was not legally married to him." She does not say that Mayfield was alive at the time she married Filmore Ball and that Ball knew he was living.

As to which of the statements set out in the assignment the objection was intended to cover, there is no specification.

The exception, which is set out on page 1 of the supplemental record, was as follows:

> Counsel for the defendants then objected to the said witness testifying against either of them, because she was the wife of the said M. F. Ball, one of the defendants herein.

An examination of the testimony set out on pages 1 and 2 of the supplemental record does not show that she gave any testimony against any of the defendants in respect of the crime charged. The entire testimony set out is simply upon the question of her marriage, and the court said, "It is only on the ground of the plea of jurisdiction of this court that I admit it; only to prove the plea of the defendant to the jurisdiction of this court as to what her husband knew." (Supplemental Rec., p. 2.)

The Government introduced the certificate showing the former marriage to Mayfield. (Rec., p. 119.)

Thus there was no question about that marriage and its validity.

There was a question as to the validity of the second marriage. The rule that the wife is incompetent to testify extends only to the lawful husband and wife. (Roscoe's Crim. Ev., p. 190; 2 Starkie Ev., p. 402; Greenleaf on Evidence, vol. 1, sec. 339.)

In Peake's Evidence (Norris), page 248, it is said:

> It is clearly settled that a woman who never was legally the wife of a man, though she has been in fact married to him, may be a witness against him; as in an indictment for bigamy, the first marriage being proved by other witnesses, the second wife may be examined to prove the marriage with her, for she is not *de jure* his wife.

When the first marriage is established to the satisfaction of the court, then the wife under the second marriage is a competent witness in respect of the second marriage, because she is not a *de jure* wife. (*Miles* v. *United States*, 103 U. S., 304, 315; Am. and Eng. Enc.

of Law, vol. 14, p. 526; Rice Crim. Ev., vol. 3, sec. 516; Greenleaf on Evidence, vol. 1, sec. 339.)

Husband and wife are competent to prove the marriage or the contrary. (2 Starkie on Evidence, 6th Am. ed., 404.)

On page 55 of the brief is the following:

> The wife can not testify against the husband. (1 Greenleaf, 834.) When *prima facie* proof is given of the fact that a woman is the wife of a party to a suit, she is incompetent to rebut this proof. (*Ross* v. *Niles*, Abb. Adm., 411.) When the fact of marriage is controverted, the wife is incompetent. (2 Stark. Ev., 400; Grigg's Case, 7 Royne, 1; *Campbell* v. *Twemlow*, 1 Price, 81.)

This is the full argument on this point.

The case of *Rose* v. *Niles* has no application to the question here.

There the court said there was *prima facie* proof of the marriage, and this rendered the deposition of his supposed wife inadmissible. It was not a case where there was, as in this instance, *prima facie* proof of a former marriage and where the evidence objected to was in respect of the validity of the second marriage.

The court said in the case of *Rose* v. *Niles:*

> There is, however, a further question in the case, for the evidence on the part of the respondents amounted to *prima facie* proof of a marriage *de facto et de jure*, and the only evidence offered by the libellant to rebut this presumption and remove the apparent incompetency was the testimony of the supposed wife herself. But she already stood before the court in the character of the lawful wife of libellant, and

as such must be excluded from testifying for him until the disqualification is removed (p. 415).

The statement in the brief that "when the fact of marriage is controverted the wife is incompetent" is not borne out by the authorities cited.

Grigg's Case is erroneously cited in the brief. It is in T. Raymond, 1.

In that case a woman was indicted for bigamy, and the first husband was called as a witness to prove the first marriage. The very essence of the charge was that the first marriage was lawful, and, of course, it followed as a necessary conclusion that the first husband was in no sense a competent witness.

The case of *Campbell* v. *Twemlow* (1 Price, 81) did not decide the question at all, all of the judges expressly declining to pass upon the question of the competency of the witness. (See pp. 88–91.)

Greenleaf says "but if the proof of the first marriage were doubtful, and the fact were controverted, it is conceived that she would not be admitted. It seems, however, that a reputed or supposed wife may be examined, on the *voir dire*, to facts showing the invalidity of the marriage." (Vol. 1, sec. 339.)

ASSIGNMENT XIII.

The thirteenth assignment, discussed on pages 56 to 57 of the brief, is as follows:

The court erred in refusing to require the officers of the Government to deliver to these defendants, or some other competent person, the gun introduced in evidence, for the purpose of testing the said gun as to

> the manner in which it would shoot "low-mould" buckshot, because said gun was the property of the defendant J. C. Ball, but had been in the exclusive possession of the Government's officials since shortly after the killing of Wm. T. Box in 1889; defendants made said request before they closed their case; it was an admitted fact that the deceased, Wm. T. Box, was killed with a shotgun loaded with "low-mould" buckshot, held by someone at a distance of 8 or 10 feet away; that the shot penetrated his body from his shoulder to his hips; the Government witness Blunt testified that the gun in court, and the property of the defendant J. C. Ball, would scatter "low-mould" buckshot badly; defendant J. C. Ball testified that he never shot low-mould buckshot from said gun. The fact as to how said gun would shoot "low-mould" buckshot was a material enquiry in this case, and a practical and thorough test of said gun would have accurately settled the disputed question as to whether said gun fired the shot that killed Wm. T. Box, as claimed by the Government, or whether it did not fire said shot, as contended by these defendants. (Rec., pp. 143, 144.)

There is nothing in the printed record showing any exception upon which this assignment is based.

The assignment shows no ground for reversal. The argument to sustain it in the brief is in substance that it was an admitted fact that Box was killed with a shotgun, loaded with low-mold buckshot, held by someone at a distance of 8 or 10 feet away; that the shot penetrated his body from his shoulders to his hip. It is next said that there was testimony showing that the gun in court would scatter low-mold buckshot badly, and that this fact was a material inquiry in the case. It is further

said that Blunt testified that said gun would scatter buckshot badly, and that at a distance of 15 or 20 feet you could hit nothing with it. (Brief, pp. 56, 57.)

There is nothing to show that it was an admitted fact that Box was killed by a gun held at a distance of 8 or 10 feet away. No witness saw the killing. A gun might scatter badly at 15 or 20 feet and yet not do so at a distance of 8 feet. This would be subject to great variation, owing to the character of powder used, the character and number of wads used, and whether or not they were rammed upon the powder, or upon the shot, or upon both. There is no evidence as to the number of shot that were in the gun when it was fired. *Non constat* that the gun in this case did not scatter badly. A number of the balls may have missed Box. Such an experiment would have been worthless, unless upon the conditions as they existed when the murder was committed, and these were not known.

The defendants had the benefit of Blunt's testimony that the Ball gun scattered badly, and it does not appear that there was any evidence contradicting it.

But, aside from all these considerations, it appears that the request was made in the midst of the trial. It does not appear that it was made when it could have been granted by the court without adjourning the trial. This was the second trial of the case, and if it was desired to make such an experiment application should have been made before the trial.

Admitting the power of the judge to grant the request, and the materiality of the testimony, there would be no ground for reversal unless there was something to show

an abuse of discretion by the trial judge, and there is an entire absence of anything tending to establish such proposition.

Counsel (on p. 57) cites Thompson on Trials (sec. 864), and the case of *The Patent Type Foundry Co.* v. *Lloyd* (29 L. J. (Exch.), 207). These were civil cases, and, besides, they do not sustain the doctrine contended for.

The Lloyd Case was upon the construction of a statute—15 and 16 Vic., c. 83, s. 42.

In section 905 of Thompson on Trials the rule is laid down that experiments in the presence of the jury are generally refused. The objection would apply with greater force to experiments made when the jury are not present, for the chances of error are increased, the uncertainty of the testimony of the witnesses being added to that of the experiments themselves.

ASSIGNMENT XIV.

The fourteenth assignment, discussed on pages 58 to 61 of the brief, is as follows:

> The court erred in admitting in evidence against these defendants, and especially against the defendants J. C. Ball and R. E. Boutwell, over the objections of these defendants, the testimony of Mrs. Rider, who testified in substance as follows: "After the killing, on the morning of June 27th, 1889, M. F. Ball (Filmore) told me that they were going to arrest him, but that he did not care, as he could prove out of it; that there were two men who stayed all night with him, by whom he could prove where he was; that they could not prove anything against him, and that they never would dream of John Ball and Bob Boutwell doing such a thing; that they would

take him and try him, but as they could not prove anything against him they would turn him loose. He said he did not see what they were tracking around for; that they could make nothing out of tracks; that he was perfectly satisfied that the tracks would exactly fit J. C. Ball and R. E. Boutwell, but so far as his tracks were concerned he was not afraid of it; he said he did not see why Joe Cross and Ed. Berney were dishing in so deep for; it was none of their business. He asked me how many shots they took out of old man Box's body. I told him, and then he said that he had shot the other load out of J. C. Ball's gun at some chickens and loaded the gun with fresh shot, and he wanted to know of me if I thought they would still think J. C. Ball's gun killed deceased. He said they were going to lay it off on an old woman there. He then told me that if he could he would call the old man back this morning as free as he ever done anything in his life. I told him it was too late. He then asked me if I had noticed anyone down there eyeing and watching him; I told him I did not, but I did see them. He asked me if he looked bad; I told him he did not; he said that he saw everybody there eyeing him all the time. He told me over a time or two about Berney and Cross tracking around there, and said if it had not been for them tracking around so much that they never would have been bothered."

And in admitting, over the objection of these defendants, the testimony of J. T. Hoover, who testified in substance as follows: "After the other trial, and after M. F. Ball was acquitted, I had a conversation with him about this case. He asked me something about the boys, John Ball and Boutwell. He asked me if I knew anything about them and how they were getting along. I told him no, but that they were in pretty bad shape, I guessed.

He said, 'I guess the boys will not hang;' I said, 'I hope not if they are not guilty.' I told him he ought to do all he could for them, and he said he done about all he could do. I said something about the people thinking that they were all guilty of killing old man Box; he said the people could think and be damned; that so far as he was concerned he could go up and admit that he did kill deceased; that it did not make a damn bit of difference now, as he had come clear and they could not try him for it any more."

Because the same was a declaration made by one of the defendants, M. F. Ball, after the homicide was committed, and was not made in the presence or hearing of the defendants, J. C. Ball and R. E. Boutwell, or either of them, and the same was calculated to mislead the jury and prejudice them against said J. C. Ball and R. E. Boutwell. (Rec., pp. 144, 145.)

The argument made in the brief (pp. 60, 61) to sustain this assignment is that the evidence objected to was a narrative of past events after the alleged combination or conspiracy to murder had come to an end, and that it was not admissible as against J. C. Ball and Boutwell, and that the court erred in not charging the jury that they could only consider it against M. F. Ball.

This objection on its face is sound, but the record shows (p. 96) when the evidence was offered that the following occurred:

COUNSEL FOR DEFENDANTS. We object to anything Filmore said as against any of the defendants except him.

The COURT. *Of course it would only be evidence against Filmore if he said anything.* (Rec., p. 96.)

The declarations of M. F. Ball were clearly admissible in evidence against him, even upon a joint trial with other defendants, and there is no ground on which their exclusion could have been sustained. (*Sparf* v. *United States*, 156 U. S., 54.)

They were not admissible as against J. C. Ball and Boutwell. (*Ib.*, 56.)

Being competent testimony in the case against one of the defendants, and being inadmissible as to the others, the only question to consider is whether or not the jury were sufficiently advised of the purpose for which the testimony was admitted by the above qualification, made by the court when the evidence was offered.

In *Sparf* v. *United States* (156 U. S., 58), the court said:

> We are of opinion that as the declarations of Hansen to Sodergren were not, in any view of the case, competent evidence against Sparf, the court, upon objection being made by counsel representing both defendants, should have excluded them as evidence against him, and admitted them against Hansen.

It would seem from this that it would be sufficient to give the instruction at the time of the admission of the evidence. Indeed, it is perfectly manifest that this would be the proper course, and that it would redound more to the benefit of the defendants than to admit the evidence without qualification, and let it sink into the minds of the jury and form impressions and then undertake to overcome them in a charge upon the entire case.

It has sometimes been doubted whether or not the withdrawal of evidence in a general charge would be

regarded as sufficient to overcome the effects of testimony which had been erroneously permitted to work upon the minds of the jury. As this testimony was clearly admissible, and as it is only a question as to how and when the qualification should be given, it seems the better reason to hold that the trial judge pursued the proper course.

This qualification by the court in the presence of the jury, when the evidence was admitted, was a sufficient instruction to the jury.

If the defendants desired any further instruction on that point, they should have made a request, which they did not do.

The judge, jury, and counsel must have understood that the court only admitted the declarations of Filmore Ball as evidence against him, and it will not do to say that counsel may, without any further objection and without any request, rest on such a qualification of the testimony as was made in this case, and then assign the action of the trial judge as reversible error.

But, independently of this question, the testimony given was not an admission of any fact showing, or tending to show, that any of the defendants had participated in the murder. It is not a narrative of anything that any of them did. Therefore, while it may have been irrelevant, it certainly did not fall within the rule applying to confessions or admissions of coconspirators, but was entirely wanting in such substance.

ASSIGNMENT XVI.

The sixteenth assignment, discussed on pages 61 to 65 of the brief, is as follows:

The court erred in refusing to give to the jury the 3rd special charge asked by the defendant M. F. Ball, which is as follows:

"3rd. If you believe from the testimony in this case that the deceased, Wm. T. Box, was a recognized citizen of the Chickasaw Nation at the time he was killed, and that he had prior to that time married a Chickasaw Indian woman under the laws of that tribe of Indians; and if you further believe that he, the said Wm. T. Box, was residing in said Chickasaw Nation at the time he was so killed; and if you further believe from the testimony that the defendant M. F. Ball, prior to the time said Wm. T. Box was killed, had also married a Chickasaw Indian woman and was recognized by the Chickasaw Government as a member of their tribe by virtue of said marriage with said Indian woman; and if you further believe that he was so recognized at the time Wm. T. Box was killed, and that at that time he, the said M. F. Ball, was residing in the Chickasaw Nation, Indian Territory, then you are charged that this court would not have jurisdiction to try the said M. F. Ball for the offense charged in the indictment herein, and you will find his plea to the jurisdiction of the court to be true."

And the court erred in his general charge when he charged the jury as follows: "M. F. Ball has filed a plea to the jurisdiction of this court, which states in substance that he was married to the daughter of Wm. T. Box; that Box had married an Indian woman living in the Indian country, and as a result of such marriage was the daughter whom

he had married, and that consequently, under the treaty between the Indians and the United States, this court was without jurisdiction to try him. The evidence offered before you first is the marriage license issued in Cooke County, Texas, which authorizes the marriage of Miss Lucy Box, the lady that Filmore Ball afterwards claims to have married, and one Mayfield. Mrs. Mayfield, or Mrs. Ball, testified that she had never been divorced from Mayfield; that she had lived with Mayfield from the time of marriage until a few months prior to her attempted marriage with the defendant, Filmore Ball. The defendant, Filmore Ball, introduces a marriage license, issued in the Chickasaw Nation, signed by the county judge and filed properly there, and that the evidence attending it shows that the marriage had been performed between him and Mrs. Mayfield. You are instructed that if you believe from the evidence that Wm. T. Box, the man that was killed, was a white man living in the Chickasaw Nation, and that he married an Indian woman, and as the result of such marriage was the lady that married Mayfield, or Ball, or both, and you believe from the evidence that she was not married to Mayfield, or that if she had been married to him that she was divorced from him, or he was dead at the time of her marriage to Filmore Ball, in that event you are instructed that the court would not have jurisdiction to try Filmore in this case. But if you believe from the testimony that she married Mayfield, and that she was not divorced from him at the time of her attempted marriage to Filmore Ball, or that Mayfield was not dead, or if he was living at the time of the attempted marriage to Filmore Ball occurred and not divorced from Mayfield, in that event the marriage with Filmore Ball

would be a nullity, on account of her disability to contract the marriage relations, and the court would have jurisdiction, and you would find against his plea to the jurisdiction of the court on that ground."

Because the testimony in the case showed that the deceased, Wm. T. Box, and the defendant M. F. Ball were each members of the Chickasaw tribe of Indians in the Indian Territory at the time the homicide was committed, and that they each resided there at the time Wm. T. Box was killed, and because the court in his general charge to the jury submitted to them for their determination the validity of the marriage of Lucy O. Box, to C. S. Mayfield and the marriage of Lucy O. Box, or Mayfield, to the defendant, M. F. Ball, without any proof having been made of the laws of the Chickasaw Nation governing marriages and divorces in said Chickasaw Nation. (Rec., pp. 146, 147.)

The request which was refused excluded from the jury every consideration of the facts going to show that M. F. Ball could not contract a legal marriage with Mrs. Mayfield. The instruction was that the jury should find in favor of his plea, if it appeared that he had "married a Chickasaw Indian woman," etc. Under this instruction, if the court had given it, they would have been bound to acquit upon finding that a void marriage had been solemnized.

The judge, in his charge, submitted to them the facts bearing upon every question legitimately raised by the plea, and among them whether or not they believed from the testimony "that she married Mayfield, and that she was not divorced from him at the time of her attempted marriage to Filmore Ball, or that Mayfield was not dead."

He instructed the jury that if she had been married to Mayfield, and had not been divorced from him, and he was living, that the marriage with Ball was a nullity, and that if they should find these facts the court would have jurisdiction.

The argument to sustain this assignment, on pages 64 and 65 of the brief, is fatally defective in that it assumes that any sort of marriage, under and by virtue of the laws of the Chickasaw Nation, and a recognition of citizenship by virtue of such marriage and residence in the nation, would, under article 38 of the treaty with the Choctaws and Chickasaws (14 Stat., 769), exclude the jurisdiction of the United States court, regardless of the competency of the parties to contract a marriage.

The treaty, of course, only contemplated a legal marriage, and it was not intended that an American citizen could, by a void contract of marriage, and by fraud, withdraw himself from the jurisdiction of the United States courts.

ASSIGNMENT XX.

The twentieth assignment, which is treated on pages 65 and 66 of the brief, is as follows:

> These defendants have not been convicted by due process of the law of the land in this: The jury that returned the verdict of guilty against the defendants in this case was not placed in charge of a duly sworn bailiff of this court after they were impaneled and charged with this case until they returned a verdict of guilty against these defendants, but, upon the contrary, said jury was in the exclusive con-

> trol of Drumgoole Williams from the time they were impaneled until they returned their said verdict, without any oath whatever being administered to him, the said Drumgoole Williams, as such special bailiff, all of which will be made apparent by an inspection of the record in this cause, here referred to and made a part hereof. (Rec., p. 149.)

The argument (brief, p. 66) to sustain this assignment is as follows:

> When the jury retire to deliberate on their verdict they are put in care of an officer, to whom an oath is administered. (1 Bishop Crim. Proc., secs. 991 and 992; *People* v. *Hughes*, 29 Cal., 257.)

It was the rule at common law, and it is the rule in a number of the States, to put the jury under the care of an officer, to whom is administered a special oath.

The oath that was administered in England is not now administered in this country in any State. (Bishop on Crim. Proc., Vol. I, sec. 991.)

There was no exception to the jury retiring under the care of the officer without a special oath being administered to him. It is not even suggested that anything improper took place, or that any injury accrued, or could have accrued, to either of the plaintiffs in error.

The officer was a deputy United States marshal, was under the direction of the judge, and had taken an oath that he would "in all things well and truly, and without malice or partiality, perform the duties of the office of marshal's deputy." (Revised Statutes, sec. 782.)

It does not appear that the judge did not instruct the marshal as to his duties in keeping the jury. The

presumption is that he did everything that was right and proper in the absence of affirmative evidence to the contrary.

The old common-law system of keeping juries in criminal cases has been greatly modified in practice in this country.

It has been held in a number of States that where the jury are committed to a sworn officer, a special oath need not be administered to him. (*Davis* v. *State*, 15 Ohio, 72; *State* v. *Frier*, 118 Mo., 648; *State* v. *Crafton*, 89 Iowa, 109; *Alterberry* v. *State*, 56 Ark., 515.)

Even though a required oath be not taken by the officer, this would be no ground for reversal, it not being shown that the jury was exposed in such a way as to be operated upon to the prejudice of the defendant. (*Sanders* v. *The People*, 124 Ill., 225.)

Even in a case of separation, Judge Lurton, in a very able opinion, in a case of great note, held that there should be no reversal if nothing occurred calculated to improperly affect the jury, saying that under such circumstances "to set aside a verdict otherwise sustained would be to sacrifice substance to form, and bring the administration of law into just discredit." (*King* v. *State*, 91 Tenn., 626.)

If this assignment be well taken, then it follows that the defendants must all be discharged, and can not be tried again, for having been put in jeopardy they could not again be tried if the jury was disbanded without their consent, and the gist of this assignment is that the jury was no longer a legal body after they went out of the court in charge of one who was not an officer.

ASSIGNMENT XXIII.

The twenty-third assignment, discussed on pages 66 to 70 of the brief, is as follows:

> The court erred in not granting the defendant M. F. Ball a new trial on account of the newly discovered evidence of J. L. Keeler, the marriage license of C. S. Mayfield to Louisa Rodgers, and a certified copy of the record of the divorce proceedings of *Louisa Mayfield* vs. *C. S. Mayfield*, had in the district court of Cooke County, Texas, all of which fully appears in the record in this case, here referred to and made a part hereof; because said defendant M. F. Ball had no notice prior to the trial of this cause that the Government would introduce in evidence the marriage license of C. S. Mayfield and Lucy O. Box, the wife of said defendant, and in that way attempt to show that said defendant M. F. Ball was not legally married to Lucy O. Box, alias Mayfield, a Chickasaw Indian woman, and thereby establish the fact that this court had jurisdiction to try said M. F. Ball, and because said newly discovered evidence showed conclusively that said M. F. Ball was lawfully married to said Lucy O. Box, alias Mayfield, and the deceased being a member of the Chickasaw tribe of Indians, this court did not have jurisdiction to try the said M. F. Ball for murdering said deceased. (Rec., p. 150.)

It is no ground for reversal that error was committed in refusing a motion for a new trial. (*Arkansas Valley Land and Cattle Co.* v. *Mann*, 130 U. S., 69; *Bullitt County* v. *Washer, id.*, 142; *Missouri P. R. R. Co.* v. *Chicago and A. R. R. Co.*, 137 U. S., 60; *Fitzgerald and M. Constr. Co.* v. *Fitzgerald, id.*, 98; *Ayers* v. *Watson,*

id., 584; *Van Stone* v. *Stillwell and B. Mnfg. Co.*, 142 U. S., 128; *Holder* v. *United States*, 150 U. S., 91; *Blitz* v. *United States*, 153 U. S., 308.)

This case is sought to be taken out of the rule on the ground that there was newly discovered evidence affecting the question of jurisdiction of the court, and that the question of jurisdiction is always open to be inquired into by this court.

It is true that the law is well settled that this court has power to inquire with regard to the jurisdiction of the inferior court, either in respect of the subject-matter or the person, even if such inquiry involved an examination of facts outside of but not inconsistent with the record. (*In re* Mayfield, 141 U. S., 116, and cases there cited.)

These were habeas corpus cases and were not like this, which is a proceeding to review the action of the trial court.

M. F. Ball pleaded to the jurisdiction, and the issues on this plea were submitted, with all the evidence adduced, to the jury, and the jury passed upon it under a proper charge, and the trial judge, upon a motion for a new trial, refused to set aside their verdict. It was an issue of fact. Ball had his day in court and a trial on this issue, and the case stands exactly as if he had undertaken to prove an alibi, or to raise a doubt as to his sanity or any other fact material to his defense, and the jury had found against him, and upon a motion for a new trial, setting up newly discovered evidence, the trial judge had overruled his motion. There is no more reason why he

should have a new trial before a jury, upon the issues raised by his plea to the jurisdiction, than upon any other issue.

If the trial judge thought that the newly discovered evidence was not material, or that proper diligence was not shown, or that for any other reason the motion should not be allowed, there is no reason why his action should not have the same weight in respect of these questions of fact as they would have in respect of other questions of fact which this court has uniformly refused to review.

The question here presented is entirely different from that in the case of *Smith* v. *United States* (151 U. S., 50, 55), in which the court held that there was no evidence offered by the Government that had a legitimate tendency to prove the jurisdictional facts.

ASSIGNMENT XXV.

This assignment is set out in the brief for plaintiffs in error (p. 70), but no effort is made to sustain it.

ASSIGNMENT XXVI.

The twenty-sixth assignment, discussed on pages 71 to 74 of the brief, is as follows:

> The defendant M. F. Ball has not been tried by due process of the law of the land in this: He was indicted, tried, convicted, and sentenced to death upon an indictment charging him, the said M. F. Ball, with being a principal offender in the killing and murdering of Wm. T. Box, when all of the evidence, which is made a part of the record in this case, here referred to and made a part hereof, shows conclusively that the said M. F. Ball was not present

> when the said Box was killed; that he, the said M. F. Ball, was doing no act at the time said Box was killed in furtherance of a common design of these defendants or anyone else to kill deceased; but the testimony shows conclusively that the said M. F. Ball, at the very time the shot was fired that killed deceased, was at a house a half a mile away, playing a fiddle for parties at a dance; and said testimony shows that the said defendant, M. F. Ball, was not a principal offender in the killing of said Box, but if guilty of any offense he was guilty as an accessory to said killing. (Rec., pp. 151, 152.)

On page 72 of the brief occurs the following:

> It was the intention of the Solicitor-General and counsel for plaintiffs in error to have incorporated in the printed record all the evidence that tended to connect M. F. Ball with the murder of Box.

There is nothing in the stipulation showing any intention as above set out. The stipulation shows that the Government introduced testimony "tending to sustain all of the averments in the indictment and all of the facts necessary for conviction, except plaintiffs in error *claim* the evidence showed M. F. Ball to be an accessory and not a principal." (Rec., p. 155.)

The jury found against this claim, and their finding is conclusive, since there was "testimony tending to sustain all of the averments in the indictment and all of the facts necessary for conviction." The quantum of evidence will not be considered, and the finding of the jury will not be disturbed, since there was evidence to sustain it.

The judge charged the jury as follows:

> If three parties have agreed to rob a store, one goes into a store for the purpose of committing the

actual robbery, another party is stationed 2 blocks away to keep watch, another in another direction, 2 blocks away, to keep watch. If the 3 parties have agreed upon the commission of the offense, and at the time the offense was committed each party was doing some act in furtherance of the carrying out of the purpose and common design, although not actually present at the time of the commission of the offense, he could be prosecuted and convicted as principal. In applying these principles to Filmore Ball, as to whether or not he is principal, if guilty at all, or whether accessory before the fact, depends upon what you believe from the evidence in this case.

If you believe from the testimony in this case that Filmore Ball, J. C. Ball, and R. E. Boutwell had previously agreed upon the killing of old man Box, and had agreed that R. E. Boutwell and J. C. Ball would go and kill him while the dance was going on, and that Filmore Ball would stay there and keep the crowd at the house for the purpose of concealing or preventing the parties from dispersing and coming in conflict with them or apprehending or hearing the shooting or things of that kind, and you believe that was a part of the agreement or understanding, in that event you are instructed that Filmore would be a principal as much as the others. But if you should believe from the testimony that he had encouraged, advised, or desired these parties to commit the offense, yet if you believe from the evidence that he was not acting in the common purpose or common understanding between the parties, although he might know they had gone for the purpose of killing old man Box, yet if at the time the act was done he was doing nothing that was a part of the scheme or understanding between the parties, he would not be a principal, but an accessory before the

> fact, and could not be prosecuted and convicted under this indictment. (Rec., p. 130.)

If, to accomplish the purpose of killing, it was necessary to have the dancing go on to prevent interference, and if M. F. Ball was actively engaged in this part of the work, then he was as much a principal as those who made the assault, and his active participation at the time was a necessary factor in producing the result. He was near enough to aid, and was aiding.

The jury found these to be the facts, and there is no sound reason for saying that he was merely an accessory before the fact.

His active participation was a part of the *res gestæ*.

While presence is said to be necessary to make one a principal—

> the *presence* need not be a strict, actual, immediate presence, such a presence as would make him an eye or an ear witness of what passes, but may be a constructive presence. So that, if several persons set out together or in small parties upon one common design, be it murder or other felony or for any other purpose unlawful in itself, and *each takes the part assigned him—some to commit the fact, others to watch at proper distances and stations to prevent a surprise* or to favor, if need be the escape of those who are more immediately engaged—they are all, provided the fact be committed, in the eye of the law present at it; for it was made a common cause with them, *each man operated in his station at one and the same instant toward the same common end, and the part each man took tended to give countenance, encouragement, and protection to the whole gang and to insure the success of their common enterprise.* (1 Russell on Crimes, p. 27.)

The following were cases in which it was held that, though not actually present, parties might be principals if they were doing a part in the common transaction. *Rex* v. *Passey*, 7 Car. & P., 282; *Rex* v. *Harris*, 7 Car. & P., 416; *Breese* v. *The State*, 12 Ohio St., 146.

It is insisted for the Government that there is no error, and that the judgment should be affirmed.

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